

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PJM Interconnection, L.L.C.

)

Docket No. ER15-623-000

**PROTEST AND MOTION TO REJECT FILING
OR, IN THE ALTERNATIVE,
FOR SUSPENSION AND HEARINGS BY
AMERICAN MUNICIPAL POWER, INC.,
OLD DOMINION ELECTRIC COOPERATIVE, AND
SOUTHERN MARYLAND ELECTRIC COOPERATIVE, INC.**

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On December 12, 2014, PJM Interconnection, L.L.C. (“PJM”) filed pursuant to section 205 of the Federal Power Act (“FPA”), 16 U.S.C. § 824d, proposed changes to the Reliability Pricing Model (“RPM”) provisions set forth in the PJM Open Access Transmission Tariff (“Tariff”) and the Reliability Assurance Agreement Among Load Serving Entities in the PJM Region (“RAA”).¹ Central to PJM’s proposal is the creation of two new capacity products -- “Base Capacity Resources” and “Capacity Performance Resources.” PJM proposes that existing Capacity Resources will become Base Capacity Resources, subject to new summer performance obligations, and that Base Capacity Resources will be phased out over the next three PJM forward capacity auctions. Starting with the 2020/21 Delivery Year, Capacity Performance Resources will be the exclusive capacity product in PJM. PJM states that it is proposing this sweeping reformulation of RPM “to better ensure that committed capacity

¹ In what is an error perhaps born of wishful thinking, PJM’s filing erroneously indicates (cover and Filing Letter at 1) that “RPM” stands for “Reliability Pricing *Market*” rather than “Reliability Pricing *Model*.” In truth, RPM has never been a “market” of any sort; it is, and always has been, a purely administrative construct through which PJM secures, through forward auctions, the rights to offered resources to meet the region’s capacity needs three years in the future. Prices in the auction are derived from a curve that is set in advance of the auction to produce desired amounts of supply, however, rather than through the operation of economic forces as would occur in an actual “market.”

resources will perform when called upon to meet the reliability needs of the PJM Region.”²

PJM’s filing includes Tariff and RAA changes that would effectuate its proposal, as well as at least one other fundamental change in RPM that is not necessitated by, or even related to, the Capacity Performance construct.³

By this submittal, American Municipal Power, Inc., Old Dominion Electric Cooperative, and Southern Maryland Electric Cooperative, Inc. (collectively, “Joint Protestors”) protest PJM’s December 12, 2014 filing in this docket and move for its rejection pursuant to Rules 211 and 212 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.212 (2015).⁴ For the reasons set forth below, Joint Protestors submit that the Commission should reject PJM’s Capacity Performance filing as an unwarranted change in RPM that would dramatically increase costs to load while failing to promote improved reliability. Indeed, the only thing PJM’s filing ensures is an immense increase in revenue flow to generators, with no assurance the increased revenue will produce investment in the facilities and equipment PJM claims are needed.

In the alternative, if the Commission declines to reject the Capacity Performance filing, it should (at a minimum) suspend the Tariff and RAA changes included in the filing for five months and set them for a full evidentiary hearing. An evidentiary hearing would permit a thorough adjudication of the proposed changes, including an examination of their efficacy and their impacts on customers. That hearing also should consider the totality of charges and revenues that PJM’s capacity-related rules impose on load-serving entities (“LSEs”) and

² Filing Letter at 1.

³ See discussion of PJM’s proposed elimination of the Short Term Resource Procurement Target (the so-called “2½% holdback”) in Part VI, *infra*.

⁴ Each of the Joint Protestors has filed a motion to intervene in this proceeding.

consumers, especially in conjunction with other recent rule-change filings by PJM, to ensure that the contemplated restructuring of RPM is just, reasonable and not unduly discriminatory, both on its own and in tandem with all other capacity-related charges and credits.

I. INTRODUCTION AND SUMMARY OF POSITION

A. *Joint Protestors' Overall View of Capacity Performance.*

Joint Protestors realize that, in protesting a filing PJM claims is necessary to “provid[e] the reliability that the region expects and requires,”⁵ they run the risk of being characterized as somehow complacent about reliability. That allegation, should it be made, would be unfair and inaccurate. Each of the Joint Protestors has a strong interest in preserving the reliability of service in the PJM region over both the near and long term, and each of the Joint Protestors is committed to doing its part in that effort. That said, Joint Protestors’ objections to PJM’s Capacity Performance proposal can be summed up in this statement:

***Capacity Performance is too much, too quickly,
for no clearly stated reason.***

Capacity Performance is “*too much*” in that it is a dramatic restructuring and redirection of PJM’s resource adequacy construct, initiated to address the operational performance of capacity resources during last winter’s cold weather events but undertaken largely in isolation from other initiatives that are more directly focused on the very same operational performance concerns and that already are yielding positive results. In this regard, the extent to which Capacity Performance would fundamentally alter PJM’s capacity adequacy construct cannot be overstated; PJM itself described the proposal as “*a significant redefinition of what it means to be*

⁵ Filing Letter at 2.

*a capacity resource in PJM.*⁶ Among many other things, Capacity Performance would impose new, more stringent performance requirements on existing PJM capacity products, but then would phase them out over a very short timeframe and stand up in their place a single, entirely new product – Capacity Performance Resources – that would be subject to strict “no excuses” performance requirements. In addition to the direct costs resource owners would incur to satisfy these requirements – costs that undoubtedly will be priced into supplier offers and recovered from load – owners also would be exposed to far greater financial penalties for resource outages than is now the case. In offering a resource into the PJM capacity auction, an owner would be treated as having made a “contractual representation” about each offered units’ availability during peak periods, and each owner would face severe financial penalties if resources are unable to generate, essentially for any reason, when actually called.

In saying that, as proposed, Capacity Performance would be imposed “*too quickly*,” Joint Protestors refer both to the development of the proposal and to the timeframe over which it would be put into effect. Stakeholder participation in the development process was limited in a number of ways, and the process was hastily executed and woefully short, all so that PJM could rush Capacity Performance into effect as soon as possible – indeed, some elements of it already have been put into effect, *before the Commission has taken any action on the filing.*⁷ The haste

⁶ See the joint PJM-IMM cost-benefit analysis titled “Capacity Performance Initiative” posted at www.pjm.com/~media/committees-groups/committees/elc/postings/capacity-performance-cost-benefit-analysis.ashx (hereinafter, “PJM Cost-Benefit Analysis”), at 1 (emphasis added).

⁷ See the notice posted by PJM and the IMM at <http://www.pjm.com/~media/markets-ops/rpm/rpm-auction-info/pjm-imm-communication-regarding-key-bra-activities-deadlines.ashx>. That notice advises market participants that the filing in this docket establishes a January 11, 2015 deadline for resource owners to submit information that only would be required if the Commission accepts the Capacity Performance filing and makes it effective before the May, 2015 BRA. PJM’s haste is such that it held resource owners to that deadline even though it fell on a Sunday. See the document titled “Capacity Performance Filing FAQ” posted at <http://www.pjm.com/~media/committees-groups/committees/elc/postings/capacity-performance-filing-faqs.ashx>, Q&A No. 84.

with which PJM proposes to implement Capacity Performance is forcing resource owners and loads alike to make important decisions with long-lasting financial and reliability effects without enough time or information to make well-analyzed decisions. Moreover, in order to make “transitional” components of Capacity Performance effective for the delivery year starting June 1, 2016, PJM even proposes to rewrite the deals that were struck with suppliers whose resources cleared in the already-closed Base Residual Auctions (“BRA”) for 2016/17 and 2017/18, so that resources which already cleared in those auctions can re-offer as Capacity Performance Resources at what undoubtedly will be much higher prices. PJM proposes to take this extraordinary step even though the resources that cleared in those auctions already have an obligation to be able to perform when dispatched, and notwithstanding that there is no indication of capacity shortages or unusual operational performance problems expected during the delivery years in question. Indeed, PJM is *oversubscribed* for capacity in the already-cleared delivery years it would reopen for Capacity Performance offers.

Finally, in saying that PJM’s hurried efforts to implement Capacity Performance are “*for no clearly stated reason,*” what we mean is that PJM has failed to articulate clear reasons why Capacity Performance should become the “new normal” for PJM when the conditions that gave rise to it almost certainly are not. But even if the Commission were to accept the proposition that operational performance in PJM must be aggressively addressed right away, the fact is that PJM already has under way a number of initiatives that attack operational performance issues in a much more direct and focused manner than would the Capacity Performance proposal. These initiatives include a program for testing and verifying the capability of units to generate during cold weather, the promulgation of a checklist for operators identifying “best practices” for cold weather generation, changes to unit commitment practices and adoption of a process for owners

to designate selected units that they wish to load before an extreme weather event sets in.⁸ These and other PJM initiatives already are yielding very positive results in the form of improved operational performance of capacity resources. Yet, without so much as a nod to these efforts, PJM seeks to press ahead with a complete restructuring of RPM, ostensibly to correct the downward trend in operational performance but before giving its own more-focused efforts in the same area a full and fair opportunity to work.

Although PJM denies that Capacity Performance is all about “the vortex,” Joint Protestors’ sense is that Capacity Performance is, at bottom, a hasty and ill-conceived reaction by PJM to last winter’s events (or, perhaps more accurately, a reaction by PJM to *the reactions of others* to last winter’s events). The proposal gives every indication of being born of a belief that *some* dramatic action must be taken, and taken now, lest the responsible entities be charged with laxity the next time extreme weather or other unusual conditions challenge the system. But it must be remembered that, in proposing to revamp RPM – a step that PJM apparently decided is dramatic enough for its purpose – PJM places the economic burden of its actions on LSEs and the consumers they serve, who ultimately will bear the costs of Capacity Performance. And the Commission should make no mistake about it: the costs that consumers would be forced to pay for this latest rewrite of RPM are nothing short of breath-taking. Though unmentioned in the December 12 filing, PJM and its Independent Market Monitor (“IMM”) have calculated that Capacity Performance could increase capacity costs by as much as \$4.0 billion during the 2015-2018 period,⁹ and by as much as \$700 million each year from then on, even after factoring

⁸ These initiatives are described in more detail in Part II, *infra*.

⁹ See PJM Cost-Benefit Analysis, *supra* note 6, at 4. As we observe elsewhere in this Protest, much of the additional revenue collected during the “transitional” delivery years of 2016/17 and 2017/18 would be paid to generators

[Footnote continued on following page]

in purported offsetting savings in energy market costs.¹⁰ It appears that, in large part, the forecasted incremental capacity costs would result from efforts by resource owners to meet the unrealistic and unwarranted performance requirements PJM seeks to apply to every resource that hopes to offer into a PJM capacity auction. Those requirements may or may not improve resource availability, but they most assuredly will saddle LSEs and consumers with vastly increased costs.

In the end, Capacity Performance would complete PJM's reversal of the multi-party settlement that gave rise to RPM in the first place.¹¹ Originally meant to serve as a *residual* market for capacity that LSEs might require to supplement their bilateral and self-supply arrangements, RPM since has been converted (over the objections of most LSEs) to a must-buy/must-offer mechanism that provides the "missing money" generators have claimed to need in order to invest in new facilities. Now, after being made to satisfy the generators' "missing money" claims, load interests are being told by PJM once again that they must do *much more, right now*, to secure the level of reliability they thought they were paying for already.¹² And so,

whose resources already cleared in the BRAs for those years and, so, are already subject to a binding commitment to serve. The Commission would do well to inquire of PJM (*e.g.*, through a deficiency letter) whether this aspect of its proposal is intended simply to get additional money in the hands of generators that have publicly threatened to shut down their large base-load resources due to a claimed inability to cover their costs. If that is the goal, PJM should be upfront about its purpose so that affected parties and the Commission can evaluate the effort on its merits.

¹⁰ *Id.* It should be noted that the PJM Cost-Benefit Analysis is dated October 24, 2014, and that it therefore does not reflect the Capacity Performance proposal as it was later approved by the PJM Board on December 3, 2014 and filed by PJM on December 12, 2014. PJM's lengthy filing, however, includes not a word about the cost impacts of its proposal (other than to note in passing, Filing Letter at 29, that a phased implementation is necessary to "protect consumers from price spikes"). Joint Protestors, therefore, have little choice but to rely on PJM's October 24, 2014 study. If PJM contests the estimates noted in text, it is incumbent upon PJM to submit an updated study for the record.

¹¹ See *PJM Interconnection, LLC*, 117 FERC ¶ 61,331 (2006).

¹² In announcing the results of the May 2014 BRA for Delivery Years 2017/18, PJM stated that the auction cleared a significant amount of new combined-cycle gas-fired generation located downstream of west-to-east transmission constraints, as well as a significant shift in demand resources from limited summer availability to extended and annual availability (described by PJM as "the types of demand resources that have more flexibility and a greater

[Footnote continued on following page]

with the creation of Capacity Performance Resources and their designation as the sole PJM capacity product beginning in 2020, RPM would become the *predominant or even exclusive source* of revenue for generators. This step would take RPM as far from its original purpose, and from the terms of the settlement that created it, as Joint Protestors can imagine.

B. Joint Protestors' View Regarding the Specifics of PJM's Proposal

As to the merits of the Capacity Performance filing, Joint Protestors discuss in the following sections of this Protest the significant deficiencies and flaws we have identified to this point in PJM's filing. Joint Protestors' position on these matters, in very summary form, is as follows:

- The Capacity Performance proposal is the product of a flawed application of PJM's "Enhanced Liaison Committee" process. That process was conducted in such a manner as to deprive stakeholders of their rights to an open and collaborative RTO decision-making process, as required by 18 C.F.R. § 35.28(g)(6). Among the reasons the process violated the specified requirements is that the time to discuss and evaluate the Capacity Performance proposal was unduly truncated (only four months) and, as PJM admits, major changes were made in the proposal between the time stakeholder coalitions had an opportunity to comment and the time the Board approved the final terms of the proposal for filing.¹³
- The potential costs of Capacity Performance are unjust and unreasonable because they vastly outweigh the benefits. By PJM's own admission, system reliability was never in jeopardy during the cold weather events of last January. Therefore, the avoidance of wide-area outages is not the proper benchmark for evaluating the benefits of the proposal. Rather, the costs should be weighed

contribution to reliability"). A PJM official commented that the auction results show that RPM "sends the right signals to generators," and that generators had responded in the auction "with new resources concentrated in the most capacity and transmission needy areas." See news release titled "PJM Capacity Market Secures New and Diverse Resources to Meet Future Electricity Demand," dated May 23, 2014 (posted online at <http://www.pjm.com/~media/about-pjm/newsroom/2014-releases/20140523-pjm-capacity-market-secures-new-and-diverse-resources-to-meet-future-electricity-demand.ashx>).

¹³ See the further discussion in Part X, *infra*.

against the system uplift costs that might have been avoided last winter had adequate PJM unit commitment and dispatch rules been in place or unit availability and performance been better. Judged by that measure, the costs of Capacity Performance – as much as \$4.0 billion during the 2015-2018 period, and \$700 million each year from then on, according to an earlier PJM estimate – vastly outweigh the avoided uplift benefits (roughly \$600 million in January 2014). While those estimates admittedly were based not on the final version of Capacity Performance, PJM elected not to include updated estimates in its filing; indeed, the filing carefully avoids discussing the costs of Capacity Performance.¹⁴

- Capacity Performance is unduly discriminatory. As proposed, Capacity Performance unduly discriminates against single-unit resource owners, as well as against Demand Response and renewable resources. In order to be able to offer as Capacity Performance Resources, these resources would be forced into complex “coupling” arrangements that would entail unnecessary cost and risk. Many may view exit from the market as the preferable option.¹⁵
- PJM’s resource performance requirements are unworkable and unrealistic, and compliance is likely to be prohibitively costly. The eligibility requirements for the new Capacity Performance product are at best vaguely defined, but to the extent they are stated in the filing, they are unrealistic and impractical; application of those requirements would dramatically increase the costs borne by load without assuring any material improvements in reliability.¹⁶
- The Capacity Performance proposal puts far too much discretion in PJM’s hands. The proposal gives PJM veto authority over any resource that seeks to offer into the RPM auctions as a Capacity Performance Resource. PJM has the right to reject offers by a resource if the owner does not prove to “PJM’s satisfaction” that the resource satisfies the vague, circular and arbitrary requirements. The owner’s right of recourse to FERC is likely to be meaningless in practice because of the limited time between PJM’s denial and the commencement of the auction.¹⁷

¹⁴ See the further discussion in Part III.A, *infra*.

¹⁵ See the further discussion in Part III.B, *infra*.

¹⁶ See the further discussion in Part IV, *infra*.

¹⁷ See the further discussion in Part VII, *infra*.

- PJM’s transition arrangements for 2016/17 and 2017/18 are a pure give-away to the owners of cleared and committed resources. The auctions for Delivery Years 2016/17 and 2017/18 have already been run, and PJM acquired excess capacity for both years. Yet, PJM proposes to reopen those years in order to procure Capacity Performance Resources on a voluntary-offer basis. Most of the resources that could qualify as Capacity Performance Resources in those years will be the same resources that already cleared in the applicable BRAs and, so, the resources are already under an obligation to serve. Allowing them to re-offer as Capacity Performance Resources and collect the higher prices that status will bring is a pure and simple give-away of ratepayer money numbering in the billions of dollars.¹⁸
- PJM’s proposal to end the 2½% procurement holdback is wholly unjustified. This surprising component of PJM’s filing was raised late in the Enhanced Liaison Committee process, but it has no place in the filing because ending the holdback would have no effect on operational performance, one way or the other. The only impact ending the holdback would have is to push capacity clearing prices even higher than they otherwise would be.¹⁹
- The Capacity Performance filing would put new restrictions on RPM participation by external resources, thereby squelching once and for all the price-moderating effects of competition. PJM’s Capacity Performance filing would finish the job that was begun by its Capacity Import Limits foray last year. Now, in order to offer into the RPM auctions, a resource must be a part of the PJM Balancing Area through an approved pseudo-tie; fitting within the applicable CIL is no longer good enough for an external resource to be able to offer. RPM participation by external resources would be further hobbled, and possibly extinguished, by PJM’s proposal.²⁰
- PJM’s Capacity Performance proposal would diminish necessary market power mitigation. Pursuant to PJM’s proposal, the policy of mitigating resource prices down to the level of cost – a response to structural market power – would be replaced with what is essentially “safe harbor” pricing all the way up to Net CONE and an opportunity to justify bids *above* Net CONE based on an expanded list of includable costs. Bids up to Net CONE would be

¹⁸ See the further discussion in Part V, *infra*.

¹⁹ See the further discussion in Part VI, *infra*.

²⁰ See the further discussion in Part IX, *infra*.

largely protected from scrutiny, and offer price mitigation would be replaced with draconian penalties to address exercises of market power.²¹

- PJM’s proposal would override or displace ongoing important Commission initiatives. The Commission’s ongoing efforts in Energy and Ancillary Services Price Formation, Capacity Constructs and Gas-Electric Coordination will appropriately address many of the issues PJM cites as problems in its region on a national level. Capacity Performance would effectively override or displace those efforts.²²
- RPM would be made to function in a manner that was never intended or contemplated. Capacity Performance would complete RPM’s conversion from a residual market (its intended purpose), to the source of “missing money” for generators, all the way to becoming the *predominant* source of revenue for PJM resource owners.²³ This is a function RPM was not designed to serve, was never intended to serve, and should not be forced to serve.

The foregoing is not meant to be an exhaustive list of Joint Protestors’ concerns with PJM’s Capacity Performance filing. Reference is made to the body of the Protest for a more complete discussion, and Joint Protestors necessarily reserve the right to identify and bring to the Commission’s attention additional issues as our analysis of the PJM filing continues.

C. Joint Protestors’ Recommendations

Joint Protestors recommend the following Commission actions in response to PJM’s filing of its Capacity Performance proposal:

1. Reject the filing. For the reasons summarized above and discussed in more detail in the remainder of this Protest – not least that the Tariff and RAA changes included in PJM’s filing are unjust, unreasonable and unduly discriminatory – the Commission should reject the filing. In rejecting the filing and returning it to PJM, the Commission should expressly direct PJM to take certain specific actions in accordance with Commission-specified deadlines, as follows:

²¹ See the further discussion in Part IV.D, *infra*.

²² See the further discussion in Part III.C, *infra*.

²³ See the further discussion in Part I.A, *infra*.

- (a) Focus on Winter 2015/16. The Commission should direct PJM to place its highest priority on addressing the Winter of 2015/16, which has the clearest potential to pose resource adequacy and operations challenges for PJM. PJM should be required to focus on getting in place the resources and the operational process improvements it needs to ensure reliable service during that period before devoting resources to other RPM initiatives.
 - (b) Support ongoing Operational Performance initiatives. PJM should be directed to support and expand its ongoing initiatives directly focused on improving the operational performance of capacity resources.
 - (c) Explore energy market rule changes in line with Commission initiatives. PJM should be directed to initiate a collaborative and open stakeholder process to explore a comprehensive set of energy market improvements that draw upon the Commission's Price Formation inquiry.²⁴ PJM should be required to make a filing by a date certain explaining its progress in this area, and should be given a deadline for filing such energy market rule changes.
2. Alternative actions. If the Commission chooses not to reject the filing, it should suspend the filing for maximum five-month period, set it for hearing, and take the following additional actions:
- (a) Eliminate or delay TIAs. Require that PJM eliminate provisions for the Transition Incremental Auctions for 2016/17 and 2017/18 as being unnecessary and simply a windfall for already cleared and committed resources; or, if the Commission declines to order elimination of the TIA provisions, delay their effectiveness so that resource owners may have a reasonable opportunity to evaluate their options before making major commitments.
 - (b) Retain procurement holdback. Require that PJM retain the Short Term Resource Procurement Target ("2½% holdback") as a feature of RPM.
 - (c) Direct support for ongoing Operational Performance initiatives. Direct PJM to continue supporting, and expand support for, ongoing

²⁴ PJM's filing in Docket No. EL15-29 does not fit the bill. The energy market rules changes filed in that docket were developed without meaningful stakeholder input or consideration, unreasonably shift to market sellers risks over which they have no control, and ignores issues such as gas-electric coordination and energy and ancillary services price formation. In their protest being filed in Docket No. EL15-29 today, Joint Protestors argue for rejection of that filing on these and other grounds.

activities aimed at improving the operational performance of capacity resources.

- (d) Direct the filing of limited changes to penalty structures. PJM should be directed to initiate a full stakeholder process to evaluate changes to existing penalty structures that are generally consistent with the limited changes in penalty structures and unit commitment rules discussed in Section III.G above
- (e) Direct consideration of updated Triennial Review Parameters. If the Commission permits PJM's Capacity Performance proposal to go into effect, PJM should be required to evaluate whether the effectiveness of its filed Tariff and RAA changes necessitates or recommends changes in the Triennial Review Parameters recently accepted in Docket No. ER14-2940.

Additional detailed recommendations are included in the body of this Protest in relation to specific Tariff and RAA issues arising from PJM's filing.

II. PJM HAS NOT DEMONSTRATED THAT A FUNDAMENTAL RESTRUCTURING OF RPM IS NECESSARY OR APPROPRIATE AT THIS TIME.

PJM's consideration of Capacity Performance came close on the heels of the extreme weather experienced during January 2014, including the so-called "polar vortex" event of January 6-8, 2014. PJM contends in its filing that its Capacity Performance proposal addresses market rule deficiencies that needed to be corrected regardless of last winter's weather, and that "[e]ven if there were never another Polar Vortex, the misaligned incentives under the current market rules would remain, and those rules therefore would continue to fail to support needed changes to improve resource performance."²⁵ Yet, the efforts to address underlying problems that PJM claims to have undertaken before last winter's events were focused, not on the capacity

²⁵ Filing Letter at 19.

market design, but on gas infrastructure issues.²⁶ Another rewrite of the RPM rules only came to the fore after, and in response to, last winter’s weather events. In fact, the “problem statement” that PJM issued at the outset of the Capacity Performance discussion begins with an extensive review of last January’s weather events and the steps taken to serve load through that period.²⁷

Detailed assessments by PJM staff have identified the primary causes of the operational performance issues encountered last January. The four main drivers of lower-than-expected resource availability were: (1) gas/electric coordination issues, including gas fuel deliverability limits on extreme winter days when resources were not committed day ahead or were curtailed due to constraints within a local gas distribution company;²⁸ (2) generating unit design constraints that prevented operation below certain threshold temperatures; (3) effects of extreme low temperatures on usability of consumables (*e.g.*, freezing of coal and limestone piles, and gelling of fuel oil); and (4) boiler and boiler control system operational problems.²⁹

Over the course of 2014, significant progress has been made in addressing three of the four drivers.³⁰ That progress was made because these three drivers, for all practical purposes,

²⁶ *Id.* at n.46.

²⁷ “Capacity Performance - Education and Dialogue Session - August 12, 2014” (posted at <http://www.pjm.com/~media/committees-groups/committees/elc/20140812/20140812-item-01-capacity-performance-problem-statement-presentation.ashx>).

²⁸ See the presentation posted at <http://www.pjm.com/~media/committees-groups/committees/elc/20140911/20140911-item-03-capacity-performance-presentation.ashx>, at slide 4 (noting that, of the 9,848 MW outages attributed to lack of fuel on January 7, 2014 at the hour ending 7:00 pm Eastern time, 8,503 MW (or 86%) had not been committed day-ahead).

²⁹ See the presentation posted at <http://www.pjm.com/~media/committees-groups/committees/oc/20140818/20140818-item-02-cold-weather-resource-improvement-education.ashx>, at slides 14-15 (noting that “boiler issues” represented, respectively, 19% of single fuel and 29% of dual-fuel forced outage causes during the hours ending 6:00 pm and 7:00 pm Eastern time on January 7, 2014).

³⁰ See the document posted at <http://www.pjm.com/~media/committees-groups/committees/mc/20141027-webinar/20141027-item-02-hot-and-cold-weather-recommendation-update.ashx>, (documenting progress made in PJM’s efforts to address, among other things, cold weather resource availability improvement (checklist/exercise) and gas unit commitment coordination).

can be addressed through fairly modest adjustments in the pricing and penalty mechanisms in the PJM energy market rules, and through targeted changes in unit operating standards and practices. All four of the factors identified as primary drivers of operational performance can be addressed *without overhauling RPM*. Indeed, PJM and its stakeholders have already made significant progress.

Of the four primary drivers, the gas/electric coordination issue is one that the Commission itself may need to address more broadly before concluding that PJM's Capacity Performance proposal is a reasonable and necessary step. In its May 8, 2014 analysis of operations during last January's cold weather, PJM cited the inflexibility of gas scheduling protocols and a mismatch between gas and electric scheduling deadlines as "the key contributor to operational challenges" last January.³¹ Gas availability issues arising from disjunctive scheduling rules could be resolved or greatly mitigated by satisfactory completion of the Commission's efforts to harmonize the gas and electric scheduling days. As the gas day is moved up and PJM's day-ahead market is moved up commensurately, PJM gas generators could receive day-ahead awards in time for a timely gas cycle nomination, increasing the certainty that gas resources will be able to obtain fuel. The Commission should complete its efforts to

³¹ See "Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events" (dated May 8, 2014, posted at <http://www.pjm.com/~media/documents/reports/20140509-analysis-of-operational-events-and-market-impacts-during-the-jan-2014-cold-weather-events.ashx>) (hereinafter, "PJM Operational Analysis"), at 5; *see also, id.*, at 31:

The scheduling of natural gas-fired resources became increasingly difficult through this period because of the rigid and expensive terms and conditions generators needed to accept in order to procure gas. Certain gas-fired generators notified PJM that they could get gas only if they committed to operate at a fixed output for an extended period of 24 hours or more in some cases. The fact that the period included two weekends – one of them a holiday weekend – exacerbated the fuel procurement-related situation. The timing difference between the gas and electricity markets also resulted in generation owners having to commit to buy gas before knowing whether their units would be scheduled to operate.

harmonize gas and electric scheduling practices before concluding that actions as drastic as restructuring the capacity market are necessary.

Viewed, then, as a response to January 2014's cold weather events, the Capacity Performance filing is clearly premature and, at this point in time, unwarranted. To be clear, Joint Protestors recognize the operational performance issues that PJM faced last winter, and we support and respect the efforts to prevent a recurrence of those issues (which also were the drivers of unnecessarily increased costs ultimately borne by loads). Had the operational performance issues encountered last winter resulted from a true capacity deficiency, an immediate and thorough reexamination of RPM and its incentives would have made sense. But because PJM's own analysis shows that last January's operational challenges resulted in large measure from factors that are already being addressed through focused initiatives, it only makes sense to allow those initiatives to be completed before PJM's drastic restructuring of the capacity market is accepted.

A further reason PJM's filing should be deemed premature arises from the process through which the filing was vetted by PJM and approved for filing by its Board. Consideration of a change as fundamental as Capacity Performance should have been undertaken by PJM (if at all) only after a very open and thorough stakeholder process that fully considered (1) whether Capacity Performance is needed, after taking into account the beneficial effects of the other PJM initiatives now under way to address operational performance concerns, and (2) the costs and impacts of Capacity Performance in combination with the several other capacity and energy market changes PJM has thrown into the Commission's hopper in recent weeks (*e.g.*, PJM's

proposed changes to the Variable Resource Requirement curve,³² its energy market rules modifications,³³ its energy offer cap waiver request,³⁴ its request to retain some 2,000 MW of excess capacity procurement that the PJM Tariff requires be turned back to the market in the Third Incremental Auction for the 2015/16 Delivery Year,³⁵ its request to enter into (and recover from load the costs of) out-of-market agreements with retiring generation for the 2015/16 Delivery Year³⁶, and, finally, PJM's filing of Tariff and RAA changes addressing the use of Demand Resources in light of the pending review of the *EPSA v. FERC* proceeding³⁷). In citing these other proceedings, we express no view here as to the merits³⁸ of the filings; our point simply is that Capacity Performance cannot properly be evaluated in isolation from the many other proposals PJM has put in play that also have direct bearing on resource adequacy and operational performance concerns. The process through which the Capacity Performance filing was approved by PJM's Board, however, falls far short of being an open and deliberate stakeholder process that took into consideration the full range of pertinent factors.³⁹ Without that process having been undertaken, the Capacity Performance filing should be deemed inadequately vetted and premature.

³² Docket No. ER14-2940.

³³ Docket No. EL15-29.

³⁴ Docket No. EL15-31.

³⁵ Docket No. ER15-738.

³⁶ Docket No. ER15-739.

³⁷ Docket No. ER15-852.

³⁸ In the interests of full disclosure, some or all of the Joint Protestors oppose some or all of the listed filings. In particular, in addition to the instant Protest, Joint Protestors are today protesting the energy market rule changes proposed by PJM in Docket No. ER15-29.

³⁹ Concerns with the manner in which the Enhanced Liaison Committee process was applied in this instance are discussed in more detail in Part X, *infra*.

III. PJM HAS NOT SHOWN THAT ITS CAPACITY PERFORMANCE PROPOSAL IS JUST, REASONABLE AND NOT UNDULY DISCRIMINATORY.

A. *Capacity Performance Will Impose Excessive and Unreasonable Costs on Load-Serving Entities and Consumers.*

PJM's Capacity Performance proposal violates Federal Power Act standards because it would impose unjust and unreasonable costs on the parties who ultimately will bear those costs -- namely, LSEs and the consumers they serve. This conclusion is supported by almost any meaningful measure, but one straightforward comparison drives the point home with force.

In October 2014, PJM and the IMM posted an analysis of the costs and purported benefits of an earlier version of Capacity Performance. The analysis noted that Capacity Performance "will require generators to make significant investments in plant equipment, weatherization measures, better fuel procurement arrangements, expanded fuel supply infrastructure dual fuel capability and other improvements."⁴⁰ It then estimated the annual cost of the increased performance expectations both during the transition years and in future years. PJM also factored in energy cost savings that it claimed would offset the costs incurred to increase unit availability in accordance with Capacity Performance requirements. As noted above, the analysis showed that, even after factoring in these purported energy cost savings, the net incremental cost of Capacity Performance could be as high as \$4.0 billion between 2015 and 2018, and as much as \$700 million each year thereafter.⁴¹ By comparison, PJM estimates that the energy costs uplifted to the market in January 2014 were on the order of \$600 million.⁴² Thus, the costs that Capacity

⁴⁰ See PJM Cost-Benefit Analysis, *supra* note 6, at 2.

⁴¹ *Id.* at 4.

⁴² See *id.* at 3 (stating that an estimate of \$500 million in avoided uplift costs represents "roughly 83 percent of the costs experienced solely in the month of January 2014"), and PJM Operational Analysis, *supra* note 31, at 44 (specifying energy uplift costs in January 2014 of \$597,396,000).

Performance would impose on consumers literally dwarfs the estimate of energy costs PJM charged to the market as uplift during the same period of winter weather that was the genesis for Capacity Performance. Costs that are so wildly out of proportion to the associated benefits can hardly be deemed “just and reasonable.”

Joint Protestors anticipate the response from PJM (and possibly others) that the foregoing comparison ignores the benefits of avoided wide-area power outages that Capacity Performance supposedly will provide. As argued in the PJM Cost-Benefit Analysis:

The Polar Vortex taught us that generators of all types can be vulnerable to arctic temperatures. It is important to balance the value of greater power system reliability against the cost of power interruptions, which can reach tens of billions of dollars and – especially during weather extremes – endanger human life.⁴³

Comparing the costs of Capacity Performance to the benefits of avoiding region-wide outages is a false and misleading comparison, however. PJM’s resource adequacy standards already target a very low loss of load probability based on the *current* performance characteristics of installed capacity. Indeed, PJM’s own analysis of last winter’s events led it to conclude that PJM “successfully [met] an all-time record winter peak of 141,846 MW at 7:00 p.m. January 7 *with no reliability issues.*”⁴⁴

Since existing Capacity Resources with their current operational characteristics enabled PJM to meet record peak demands last January with no reliability issues,⁴⁵ the benefits of

⁴³ *Id.* at 2.

⁴⁴ See PJM Operational Analysis, *supra* note 31, at 19 (emphasis added).

⁴⁵ PJM may be expected to respond that the system avoided reliability issues last January only thanks to the contributions of demand response and imports. Such a response should be given little weight, given that PJM’s Capacity Performance proposal would only further burden the use of demand response and imports as capacity resources. See the discussion in Part III.B, *infra*.

avoiding wide-area outages are *not* the proper benchmark for evaluating the costs of Capacity Performance (costs that would be additive to the costs *already* borne by consumers to meet PJM’s low loss-of-load-probability standard). Rather, the proper benchmark is the benefit of avoiding the market uplift experienced last winter, because uplift-avoidance may be the only provable incremental benefit of Capacity Performance. And that benefit, as noted, is dwarfed by the costs PJM market participants would incur to avoid that uplift through Capacity Performance. A proposal marked by such a huge mismatch between costs and benefits cannot be deemed “just and reasonable.”

B. PJM’s Capacity Performance Proposal is Unduly Discriminatory

1. Capacity Performance Discriminates Against Single-Plant Capacity Owners.

An additional reason PJM’s Capacity Performance proposal violates the Federal Power Act and should be rejected is that it is unduly discriminatory. One obvious respect in which the proposal is unduly discriminatory is in its treatment of generation owners who would offer capacity from single-unit plants. If such a generation owner wishes to offer its unit as a Performance Capacity Resource, and if the resource cannot satisfy PJM’s (vaguely defined) eligibility criteria to do so, the owner has the option of backing up its unit with another resource and submitting a coupled offer.⁴⁶ In order to do so, however, all of the following requirements must be met:

- The supplier’s resource must be an Intermittent Resource, a Capacity Storage Resource, a Demand Resource or an Energy Efficiency Resource.

⁴⁶ See Filing Letter at 33-34.

- The “coupled” or backup resource also must be Intermittent Resource, a Capacity Storage Resource, a Demand Resource or an Energy Efficiency Resource.
- The supplier must own or control both resources.
- Both resources must be located within the same Locational Deliverability Area (“LDA”).⁴⁷

As should be readily apparent, these provisions limit the ability of some types of resources to offer as Capacity Performance Resources (*e.g.*, an intermittent resource that wishes to couple with a conventional unit), while imposing burdensome requirements on others (*e.g.*, an intermittent resource that can couple with another non-conventional resource but only if both are in the same LDA). For example, there is no reason (or explanation provided in the filing) why the resource coupling option should be available only to Intermittent Resources, Capacity Storage Resources, Demand Resources or Energy Efficiency Resources. The owner of an Intermittent Resource should be able to back up its unit with a conventional resource (*e.g.*, a diesel generator) in order to offer the intermittent unit as a Capacity Performance Resource, should it choose to do so; indeed, from a reliability perspective, back-up from a conventional resource likely would be preferable to back-up from another of the listed types of non-conventional resources. Similarly, the requirement that both coupled resources be located in the same LDA serves no clear purpose if the LDA is neither binding when the offer is made nor expected to bind during the Delivery Year. Finally, requiring that a supplier “own[] or control[]” the coupled resources⁴⁸ creates a measure of uncertainty insofar as a supplier may wish to rely on a contractual arrangement to back up its primary unit. PJM would be in the position of deciding whether the “control” afforded by the contractual arrangement is such as to qualify the primary

⁴⁷ See proposed section 5.6.1(h) of Attachment DD of the PJM Tariff.

⁴⁸ *Id.*

resource as a Capacity Performance Resource.⁴⁹ The resulting uncertainty could force the supplier into unnecessarily secure (and, so, unnecessarily costly) backup arrangements, or the uncertainty might deter the owner from offering as a Capacity Performance Resource at all. Neither outcome would serve the interests of PJM load, and, in fact, the latter would tend to *reduce* reliability rather than improve it.

The upshot is that PJM's proposal would burden single-unit resource owners in ways that do not apply to resource owners with multiple units. The resulting discrimination is undue simply because the differing treatment has no valid basis in reliability considerations or other relevant factors.⁵⁰ By unduly discriminating against single-unit suppliers, PJM's proposal would deter participation as Capacity Performance Resources by an entire class of potential capacity providers, and to do so to the detriment of reliability.

2. PJM's Proposal Unduly Discriminates Against Renewable Generation Resources and May Also Unduly Burden RPM Participation by Demand Response.

A further respect in which PJM's proposal is unduly discriminatory (and contrary to enhanced reliability) is in its treatment of renewable generation, which is usually intermittent in nature, and possibly in its treatment of demand response, as well. PJM's proposal burdens these resource types to an extent that effectively precludes them from participating as Capacity Performance Resources. In particular, the requirement that these resources be co-located in

⁴⁹ PJM would reserve unto itself the right to reject a request for a resource to offer as a Capacity Performance Resource "if the Capacity Market Seller does not demonstrate *to the satisfaction of PJM* that the resource meets the necessary requirements" (Filing Letter at 25, emphasis added).

⁵⁰ See, e.g., *Alabama Elec. Coop. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982) (undue discrimination includes the dissimilar treatment of similarly situated parties), and *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 369 (2007) (in general, discrimination is "undue" when there is a difference in the rates, terms or conditions of service as between or among otherwise similarly situated customers).

order to “couple” (and thereby qualify as a Capacity Performance Resource) would impose risk and complexity that will deter their participation in RPM. It is equally important to point out the fact that, like more traditional generation projects, many renewable and intermittent projects are capital intensive and require long lead time investments to be undertaken. For example, AMP is constructing the largest new hydroelectric generation deployment of its kind today. That run-of-the-river deployment totals more than 300 MW of power and more than \$2.7 billion in capital investment.⁵¹ Should PJM’s proposal be approved, the AMP Member communities that invested billions of dollars in the development of renewable resources to “self- supply” capacity and renewable energy under the existing RPM rules will not get their full value, and the additional financial burden will be borne by the residents and commercial businesses of these Municipalities.

Joint Protestors have not had the opportunity to consider in detail the implications of PJM’s recent filing in Docket No. ER15-852-000, which PJM states is “intended to allow PJM and the marketplace to have a fully adjudicated method to allow demand response to participate in the May 2015 Base Residual Auction (‘BRA’), should the Supreme Court deny review of [*Electric Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) (‘*EPSA*’).”]⁵² Pending that analysis and Commission action on the filing, Joint Protestors offer their view that it would be unreasonable and counter-productive for PJM to limit the opportunities for demand response to participate as Capacity Performance Resources. This is particularly so in light of the important role demand response played in January 2014 in helping PJM operators satisfy system needs. As PJM reported in analyzing last winter’s events:

⁵¹ It also represents approximately 1,600 construction jobs and up to 40 permanent jobs.

⁵² Filing Letter dated January 14, 2015 in *PJM Interconnection, L.L.C.*, Docket No. ER15-852-000, at 1.

Demand response, although not required to respond during the winter this year, did respond and assisted in maintaining the reliability of the system. In fact, the total amount of demand response provided was larger than most generating stations. During the Polar Vortex, PJM called on demand response three times – the morning and evening of January 7 and the morning of January 8 throughout the RTO. Even though demand resources were not obligated to respond during this period, close to 25 percent of the demand response resources registered in PJM did respond and helped PJM manage the grid on the all-time winter peak day. This experience demonstrates the year-round value of demand response.⁵³

By burdening demand response resources with complicated “co-location” and common control requirements, PJM would deter the owners of those resources from participating in RPM capacity auctions. Deprived of that opportunity, demand resources may elect simply to exit the PJM region and deploy elsewhere. Based on PJM’s own analysis of last January’s events, it is inarguable that restricting the availability and role of demand resources would significantly reduce system reliability.

By the same token, it is unreasonable and discriminatory for PJM to burden the use of renewable generators as Capacity Performance Resources. There can be little doubt but that the U.S. Environmental Protection Agency’s CO₂ reduction initiatives, including EPA’s proposed Clean Power Plan, will increase the nation’s reliance on wind, solar and other renewable (but intermittent) energy sources. The inability of such resources to participate in PJM’s capacity auctions would be an economic disincentive to their use, and to that extent PJM’s proposal runs counter to national environmental policy. Any requirements that must be met to qualify intermittent, renewable, demand response and energy efficiency resources as Capacity

⁵³ PJM Operational Analysis, *supra* note 31, at 20-21.

Performance Resources should be no more burdensome or complicated than absolutely necessary to ensure they make positive contributions to reliability. The requirements PJM's filing would impose on these resources exceed what is necessary for reliability purposes,⁵⁴ and for that reason PJM's proposal unduly discriminates against intermittent, renewable, demand response and energy efficiency resources.

C. *Capacity Performance is Contrary to Commission Initiatives on Price Formation, Capacity Markets and Gas-Electric Coordination.*

PJM's proposal also is contrary to current Commission initiatives in *Price Formation in Organized Markets* (Docket No. AD14-14) as well as the Commission's September 25, 2013 Technical Conference in *Centralized Capacity Markets in Regional Transmission Organizations and Independent System Operators* (Docket No. AD13-7). Among the many issues discussed in 2013 was the concept of capacity tranches and whether operational flexibility should be addressed in the capacity construct or in the energy and ancillary services markets. The majority of conference panelists and post-technical conference commenters who addressed this issue seemed to prefer modification of the energy and ancillary services markets as opposed to layering another level of complexity into the administrative resource adequacy construct, as advocated by a few participants. And, it should be noted, this was a unifying theme shared by

⁵⁴ In addition to Joint Protestors' concerns with the co-location and common ownership requirements as applied to small, single-unit suppliers, we also find objectionable PJM's lack of consistency in how co-location requirements would be applied. Specifically, PJM would require that coupled Intermittent Resources, Capacity Storage Resources, Demand Resources or Energy Efficiency Resources be co-located within a single LDA. By contrast, no locational requirements would be applied to resources in the Capacity Performance Transition Incremental Auctions. With respect to the latter, PJM states in its filing (at 30-31) that it "will procure a percentage of the PJM Region's Reliability Requirement, to be acquired through RPM (*i.e.*, excluding FRR service areas-committed resources), for that Delivery Year on a gross basis, *without regard for where the resource is located*" (emphasis added). This lack of consistency is a further indication that PJM's proposal discriminates unduly against Intermittent, Capacity Storage, Demand Response and Energy Efficiency Resources.

entities traditionally on opposite sides of market issues. Issues of operational flexibility, such as PJM's Capacity Performance proposal claims to address, are much more appropriately addressed through properly tailored energy market solutions. Relative to price formation, a common and important theme was the need to put a high priority on "getting more reliable real-time pricing in the energy and services markets," since doing so would mitigate uplift and ultimately reduce the importance of capacity markets in promoting investment.⁵⁵

PJM's filing here and its companion filing in Docket No. ER15-29 both would address operational performance issues arising from the mismatch between the "gas day" and the "electric day," but in entirely the wrong way. While the inconsistencies between gas and electric scheduling rules must ultimately be resolved, Joint Protestors submit that the rational approach is for the Commission to complete its ongoing effort to harmonize the operating days (as through the completion of its activities in Docket No. RM14-2 aimed at reforming existing natural gas industry scheduling practices) rather than for PJM simply to levy oppressive penalties on gas-fueled resources that are unable to generate when called because of scheduling-related fuel problems). PJM's proposal is simply punitive in this respect, and it does nothing to promote a resolution of the underlying problem of gas-electric industry scheduling inconsistencies.

D. PJM's Capacity Performance Proposal Cannot be Properly Implemented in the Time It Allots for that Purpose.

An additional reason for finding PJM's Capacity Performance proposal unjust and unreasonable is that the implementation timeline the proposal would establish is unreasonably truncated. In fact, the entire timeline for PJM's consideration and adoption of Capacity

⁵⁵ See, e.g., *Technical Conference on Centralized Capacity Markets in Regional Transmission Organizations and Independent System Operators*, Docket No. AD13-7-000, Transcript of September 25, 2013 technical conference, Comments of Michael Hogan, Regulatory Assistance Project, Tr. 277/13 – 279/25.

Performance was geared toward getting the new construct established in time for the May 2015 Base Residual Auction. Indeed, so rushed is the process that PJM's filing includes at least one deadline – the January 11, 2015 deadline for capacity owners to seek an exemption from the Capacity Performance must-offer requirement – that PJM knew when it made its filing could not possibly be effective as a tariff provision when resource owners would be forced to comply. But this timeline is so accelerated that resource owners were given barely any time at all in which to make the necessary assessments to make rational decisions about whether to seek an exemption. While PJM states that it “will receive and process any such requests while this filing is pending” and that the process is the same it has used for previous rule changes affecting BRA participation,⁵⁶ that does not obviate the fact that PJM's hurried timeline effectively prevents parties from making careful, well-analyzed exemption decisions.

Likewise, the filing proposes that PJM conduct two Capacity Performance Transition Incremental Auctions in late April and early May of 2015, for the 2016/17 and 2017/18 Delivery Years, and that PJM will procure 60% and 70% of its total Reliability Requirement, respectively, in those auctions.⁵⁷ The two “transition incremental auctions” will be run in accordance with parameters that, according to PJM, will be posted on its website at some unspecified time.⁵⁸ Again, a process this rushed simply does not allow interested parties sufficient time to undertake meaningful analysis before PJM would require that they make decisions and take actions having very substantial economic and reliability consequences, not just for the affected market participants but for the region as a whole. Neither does it allow sufficient time for resource

⁵⁶ Filing Letter at 3-4, n.6.

⁵⁷ See Filing Letter at 29 and proposed Tariff, Attachment DD, section 5.14D.

⁵⁸ *Id.*

owners to make the investments they might need to make to qualify units as Capacity Performance Resources. In that way, the process would provide a significant and undue advantage to the owners of resources already known to be capable of meeting the Capacity Performance Resource qualification requirements. An outcome skewed in this manner is not one that an independent RTO should be allowed to promote.

PJM's rush to implement Capacity Performance simply cannot be explained by the known facts and circumstances. There is no impending reliability crisis that would rationalize such a compressed timeline. Rather, the timeline seems designed to make Capacity Performance a *fait accompli* before the Commission will have an opportunity to examine it in a detailed and meaningful way. The usual Federal Power Act protection – making proposed tariff changes effective subject to refund – is ineffective here simply because, once the auctions have been run under the new Capacity Performance rules, it would be essentially impossible to unravel the results should the Commission later reject the proposal or require that it be substantially modified. The only real protection available in this context is a rejection of PJM's filing, or a five-month suspension of the Capacity Performance provisions so they are not in effect for the next BRA, and the whole package of proposals can then be given adequate and reasoned consideration, including a proper weighing of alternative courses of action.

E. Contrary to PJM's Stated Goals, the Radical Restructuring of RPM it Proposes May Degrade Reliability Rather Than Enhance It.

A further consideration in evaluating the justness and reasonableness of PJM's Capacity Performance filing is whether it is likely to achieve the stated goal of enhancing reliability and resource performance. Joint Protestors are concerned that PJM's proposal could very well carry with it a number of unintended consequences that actually would impair reliability over time.

The Commission should factor these into its assessment of PJM's proposal, and in its determination of whether the proposal should be accepted, rejected or substantially modified.

A significant concern in this regard is that this latest set of revisions to RPM may deter long-term investment in needed facilities simply because it highlights the continuing instability of PJM's capacity market rules. The Capacity Performance filing is just the latest in the near-constant stream of changes PJM has filed since RPM was established in 2006. The continuing instability in RPM changes create pervasive uncertainty about the market rules that will govern the recovery of long-term investments. In this instance, the uncertainty is deepened by the sweeping nature of the contemplated changes, including the replacement of existing capacity products with a single new product, the imposition of new capacity performance requirements, changes in offer caps, and new requirements for eligibility to participate in RPM auctions. Approval of this latest set of changes would send the message that even the most basic components of PJM's resource adequacy construct – even one as fundamental as “what it means to be a capacity resource in PJM” – can be changed with very little notice or process. That message would generate more uncertainty of the sort that can only discourage the long-term investments in facilities and equipment that PJM claims are needed. Over time, that outcome could result in *actual* capacity shortages in PJM (as opposed to operational performance problems).

At least as disruptive in this regard is the requirement that generators must offer into the auctions as Capacity Performance Resources regardless of the costs that would need to be incurred to achieve that status. Beginning with the 2020/21 Delivery Year, Capacity Performance would be the only capacity resource eligible to bid into the RPM auctions. For some resources, the cost to achieve the required level of operational reliability is likely to be

extremely high. And while PJM’s proposed changes to the supplier offer cap rules would allow a supplier to include all or nearly all of those costs in its sell offer, the prospect that its offer might fail to clear will remain a risk for many suppliers. That risk, coupled with the risk of severe performance penalties should the owner opt for a lower level of spending and experience operational problems as a result, could have the unintended consequence of driving otherwise viable generating units, particularly single fuel gas-fired units, out of the PJM resource mix entirely. The unavoidable result would be a diminution in the overall level of resource adequacy and regional reliability.

The Commission may not lightly dismiss these concerns as “speculative” or “unsupported.” That continuing changes in market rules deter investment is not only a fairly obvious proposition, it also is a recurring part of the commentary from observers of centrally administered markets.⁵⁹ Indeed, the prospect that these unintended consequences could impair reliability is no more speculative than the central proposition underlying Capacity

⁵⁹ No less an advocate of capacity markets than Professor Paul Joskow has described market rule instability as one of the “real problem[s] with investment in organized markets.” Transcript of Conference held February 27, 2007 in *Competition in Wholesale Power Markets*, Docket Nos. RM07-19 and AD07-7 (eLibrary Accession No. 20070227-4025) at 88/20-23. *See also* comments of Marji Phillips on behalf of Constellation Energy Group during the February 3, 2006 RPM technical conference in *PJM Interconnection, L.L.C.*, Docket No. EL05-148-000, *et al.* (eLibrary Accession No. 20060203-4026) at 145/7-10 (“Market-based investment relies on confidence in our markets, and confidence can only be achieved through stability of market rules and the absence of regulatory intervention that undermines the value of those investments.”). *See also* “PJM Capacity Market Draws Criticism at US Northeast Power Conference” (Platts, April 30, 2012) (available online at <http://www.platts.com/latest-news/electric-power/newyork/pjm-capacity-market-draws-criticism-at-us-northeast-6243417>):

At the end of the Q&A session, Daniel Congel, manager of market development for TransCanada, commented from the audience that *one of the main problems with the PJM capacity market, as well as other capacity markets in the Northeast, is that the market rules keep changing.*

If those markets are going to attract developers with a long-term investment horizon they have to “stop this intervention,” he said. “It scares people off.”

(Emphasis added).

Performance -- namely, that the possibility of receiving windfall payments for high levels of performance will drive resource owners to invest in equipment that ensures unit availability during even the most extreme conditions. Given the stakes, the Commission should not lightly decide that PJM's more optimistic brand of speculation deserves more credence than Joint Protestors' concerns about adverse unintended outcomes.

F. The Commission's Approval of ISO-New England's "Pay for Performance" Approach Does Not Validate PJM's Capacity Performance Proposal.

Though careful not to pin its fortunes entirely on the Commission's approval of ISO-New England's "Pay for Performance" ("PFP") proposal,⁶⁰ PJM nevertheless invokes the New England order on the very first page of its filing letter, and frequently cites PFP as the model for various elements of its Capacity Performance proposal. In at least one instance where it relies on PFP, PJM does so for the purpose of claiming that its Capacity Performance proposal is more moderate than PFP – the implicit message to the Commission presumably being “if you approved PFP, you *certainly* should approve Capacity Performance.”

PJM's reliance on PFP is ironic because, at the outset of the stakeholder discussions of Capacity Performance, PJM assured stakeholders that it planned to strike in a different direction than did ISO-NE. This seemed reasonable given the fundamental differences between two resource adequacy constructs as well as regional differences. At some later point, however, PJM apparently decided that, in seeking Commission approval for a capacity construct revision, the path of least resistance would be to shove the square peg of PFP into the round hole of RPM. In any case, in relying on the approval of PFP, PJM fails to fully recognize the significant

⁶⁰ *ISO New England Inc. and New England Power Pool*, 147 FERC ¶ 61,172, at P 23 (2014), *reh'g pending*.

differences in circumstances that make PJM's situation quite unlike that of New England. PJM also fails to acknowledge the many important differences between the approaches embodied in PFP, on the one hand, and Capacity Performance on the other. The Commission, however, should address these differences head-on in evaluating the Capacity Performance filing, and should not proceed as though its approval of PFP establishes a "standardized capacity market design" that PJM is free to adopt without scrutiny. In evaluating PJM's proposal for justness and reasonableness, the Commission should require that Capacity Performance stand or fall on its own merits.

1. PJM's circumstances differ from those of New England in numerous relevant respects.

In its filing, PJM acknowledges certain differences between the ISO-NE and PJM regions, but does so for the purpose of arguing that a phased transition to Capacity Performance is warranted in PJM even though the Commission approved an immediate shift to a single type of capacity product for New England.⁶¹ Closer examination shows that these differences are germane to a much more important question: whether even a phased transition to Capacity Performance is the right approach for PJM. The relevant differences cited by PJM and others include the following:

- The PJM Region is considerably larger than ISO-NE in both geography and peak demand.⁶² PJM's larger geographic area provides a measure of load diversity since all parts of the region generally will not experience the same weather conditions at the same time.

⁶¹ See Filing Letter at 28.

⁶² *Id.*

- The PJM Region has a more diverse resource mix than ISO-NE.⁶³ PJM's more diverse resource mix means that it is not as exposed as ISO-NE to adverse operational impacts from fuel supply constraints or interruptions.⁶⁴
- ISO-NE has fewer interconnections to adjacent balancing areas than does PJM. According to an ISO-NE representative, New England is "kind of radial to the Eastern Interconnection" with limited interconnection capacity.⁶⁵ PJM, by contrast, is interconnected with adjacent balancing areas to the north, south and west, and enjoys the benefits of robust intertie capacity. This provides PJM substantial capability to draw on adjacent regions when necessary to meet unexpected system loads.
- New England faced an imminent threat to reliability; PJM does not. In approving PFP, the Commission found that ISO-NE's proposed changes to the forward capacity market failed to address the region's resource performance problems "with the requisite speed," and that, "[a]s ISO-NE acknowledges, the region's resource performance problems *are threatening system reliability now.*"⁶⁶ PJM, on the other hand, does not contend that the operational performance issues it faced last January present an imminent threat to reliability.

These differences support the conclusion that operational performance issues in the NE-ISO region can place supply continuity in jeopardy far more quickly than would be the case in PJM, simply because the PJM region has a greater measure of diversity, flexibility and resilience than New England. Plainly stated, when judged by the standard of protecting reliability, New England's need for PFP is far greater than the PJM region's need for Capacity Performance.

⁶³ *Id.*

⁶⁴ See Comments of Peter Brandien, ISO-New England, *Technical Conference on Winter 2013-2014 Operations and Market Performance in RTOs and ISOs*, Docket No. AD14-8-000, transcript of April 1, 2014 technical conference at 65/17 - 66/21 (noting that oil-fired units were heavily dispatched during January 2014 due to the inversion of oil and gas prices, and that, owing to transportation constraints, large oil-fired units had as little as a single day of fuel burn left in inventory at the end of the month).

⁶⁵ *Id.* at 260/13-15.

⁶⁶ *ISO New England Inc. and New England Power Pool*, *supra* note 60 at P 23 (emphasis added).

2. Pursuant to the Commission’s directives, the implementation of New England’s “Pay for Performance” plan will be closely integrated with performance incentives in the NE-ISO energy market rules. PJM’s Capacity Performance filing, by contrast, stands apart from its proposed energy market changes.

In its order on the PFP filing, the Commission expressly recognized the relationship between ISO-NE’s proposed changes to the Forward Capacity Market and NEPOOL’s proposed changes to the energy market rules (chiefly through an increase in the Reserve Constraint Penalty Factor). In recognition of that relationship, the Commission directed ISO-NE to consider whether its Forward Capacity Market proposal should be modified to reflect the Commission’s acceptance of NEPOOL’s change in the Reserve Constraint Penalty Factor. The Commission stated in this regard:

[B]ecause the increased Reserve Constraint Penalty Factors may impact specific elements of ISO-NE’s proposal, we will also direct ISO-NE to submit as part of its compliance filing due within 45 days of the date of this order either Tariff revisions reflecting any adjustments that it believes are necessary in light of the Commission’s decision to implement Reserve Constraint Penalty Factor changes, or an explanation as to why no such adjustments are necessary.⁶⁷

As a consequence of the Commission’s order, the implementation of PFP will be coordinated with the separately proposed but jointly approved energy market changes. PJM’s Capacity Performance proposal, however, provides for no such coordination with the energy market changes it filed pursuant to Section 206, also on December 12, in Docket No. EL15-29. Rather, PJM states that, while the logic of its Capacity Performance filing also supports the Section 206 filing,

⁶⁷ *Id.* at P 27.

the Commission could find the changes in this section 205 filing to be just and reasonable without first (or concurrently) accepting the changes in the section 206 filing. To the contrary, the section 206 filing is better viewed as building on the changes in this filing. Moreover, while concurrent action on both filings by April 1 is strongly preferred, the changes proposed in the section 206 filing primarily entail energy market rule changes for forward Delivery Years, thus permitting additional time for consideration of the section 206 filing if the Commission finds that necessary.⁶⁸

Thus, while the Commission-directed approach for New England will integrate the approved capacity and energy market changes, PJM's filing essentially invites the Commission to separate Capacity Performance from the implementation of its separately filed energy market changes. As a result, the Commission's approval of PFP cannot validate the very different approach PJM here proposes.

3. New England's Performance Assessment Hours were based on a careful probabilistic loss of load evaluation; PJM's was not.

Both PJM and New England define the hours of critical need for energy and reserves during which resources will have their performance judged against their committed capacity obligation to determine performance payments or charges. In New England, performance is assessed during Capacity Scarcity Conditions, which occur when the supply of energy and real-time reserves is insufficient to meet applicable load and reserve requirements. ISO-NE conducted analysis using its system planning model to determine the expected number of scarcity hours to be 21.2 when the system has capacity just sufficient to meet the 1-day-in-10-years planning criterion. PJM defines Performance Assessment Hours to be hours of declared Emergency Actions. No analysis is offered to support the expected number of Emergency Action

⁶⁸ Filing Letter at 5.

hours going forward, though the filing notes that there were 23 emergency action hours in Delivery Year 2013/14.

G. The Concerns That PJM Cites as Justification for its Capacity Performance Proposal Can be Satisfied through Far Less Costly Means.

Joint Protestors endorse PJM's stated goal of improving the operational performance of Capacity Resources. As stated above, LSEs should not be compelled to pay for capacity that is unable or unwilling to deliver energy when called upon to do so by PJM's dispatchers. The solution PJM offers, however – a fundamental reworking of RPM – is perhaps the least focused and most costly way of pursuing the goal of enhanced operational performance.

Significant improvements in the operational performance of Capacity Resources already have been yielded by several targeted initiatives undertaken by PJM during 2014. Among these important PJM initiatives are the following:⁶⁹

- Gas Unit Commitment coordination in real-time operations (designed to improve the clarity, transparency and standardization of handling long-lead gas unit commitment and units committed ahead of the day-ahead market due to fuel scheduling or operational requirements).
- Cold weather resource capability testing (designed to improve the performance of resources during extreme cold weather events through performance verification or testing of certain resources during cold weather, including testing dual-fuel capability).
- Improved data sharing and coordination with the gas industry (aimed at improving the tools and processes for two-way communication with the gas industry to enhance situational awareness and better evaluate impacts on PJM generation).

⁶⁹ See the PJM Operating Committee summary titled "Cold Weather Recommendation Status" (posted at <http://www.pjm.com/~media/committees-groups/committees/oc/20141203/20141203-item-12-and-13-hot-and-cold-weather-recommendation-updates.ashx>) and Winter Weather Procedure Changes Webinar, PJM System Operator Training Dept. (November 24, 2014) (posted at <http://www.pjm.com/~media/training/webex-documents/winter-weather-procedure-changes.ashx>) at slide 16.

Apart from these targeted initiatives, additional improvements to operational performance can be obtained through fairly modest changes in PJM's existing penalty structure. Specifically, there are several changes to the current RPM penalty framework that should be considered, including the following:

- Calculate summer and winter penalty settlement periods separately rather than as a combined summer and winter period (*see* Tariff, Attachment DD Section 10).
- Eliminate the existing 50 service hour threshold for exposure to performance penalties that allows infrequently units to effectively escape application of the current penalty structure (*see* Tariff, Attachment DD Section 10.f).
- Modify fuel availability excuse for NG units in winter as long as PJM commits in a timely manner consistent with nomination windows for the type of day which more closely preserves the intent of the original RPM settlement while strengthening the existing penalty provision (*see* Tariff, Attachment DD Section 10.e).
- Target enhanced incentives to the specific asset types requiring operational performance improvements, thereby sparing the owners of other asset types the overhang of penalty risk.
- Set the EFORp penalty level in inverse proportion to the capacity factor, which would place a greater proportion of RPM capacity payments at risk for lower utilization assets while keeping the same risk level for higher utilization resources. This could better enhance incentives for less frequently operated assets without imposing excessive risk on all market participants.

In sum, it is Joint Protestors' view that operational performance issues can (and should) be addressed directly, through better preparation and coordination and improved unit commitment rules, rather than indirectly, in a broad and unfocused way, through a fundamental restructuring of the capacity adequacy construct PJM has long touted as an effective vehicle for promoting investment. PJM's ongoing operational performance initiatives, coupled with carefully tailored changes in the existing penalty structure, promise significant improvements in unit availability and dispatch response. There is no need for a market restructuring as extensive

and expensive as PJM's Capacity Performance proposal when more focused changes in operating practices and penalties will achieve the desired results at far less cost to the region. At a minimum, these steps should be afforded a reasonable opportunity to produce lasting improvements in operational performance; and only if these steps fail should the Commission consider adopting the drastic RPM restructuring proposal filed by PJM.

IV. PJM'S PROPOSAL IS SO LACKING IN FUNDAMENTAL DETAILS THAT IT IS NOT POSSIBLE TO DETERMINE HOW IT WILL FUNCTION IN OPERATION OR WHETHER IT IS COST-EFFECTIVE.

As discussed herein, PJM's proposal is a highly complex, fundamental change to PJM's resource adequacy construct. In order for such foundational changes to be implemented, the proposal must include a detailed blueprint -- otherwise, the proposal remains essentially theoretical. Unfortunately, PJM's Capacity Performance proposal lacks so many elementary details that it is likely incapable of being put into effect from a practical standpoint. The particulars that are included are unrealistic and sometimes contradictory. Given the magnitude of the changes embedded in the proposal coupled with the woefully inadequate time and process spent to develop the proposal, the lack of sufficient or workable details is, perhaps, unsurprising. However, these deficiencies will surely lead to greater costs and performance risk, and ultimately compromise any ability for practical application or even realization of potential benefits.

The Joint Protestors briefly identify some of the proposal's shortcomings below in order to highlight the fact that the proposal simply is not ready for implementation. In order to provide constructive feedback and not simply attack the proposal, the Joint Protestors also provide suggestions that could remedy some of the deficiencies identified. In so doing, however, Joint Protestors do not mean to convey the impression that we could support PJM's proposal if the Commission were to adopt each of the proposed remedies in this section. That is by no means

the case, owing to the far more fundamental concerns with PJM's proposal that are discussed in the other sections of this Protest.

A. Resource Eligibility as a "Capacity Performance Resource"

PJM notes that, "at its core" a Capacity Performance Resource must be "capable of sustained, predictable operation that allows the resource to be available to provide energy and reserves whenever PJM determines an emergency condition exists." Filing Letter at 22. While this is a laudable goal, definitions should consist of specific criteria, not aspirational statements. As a result, there are serious issues with the Capacity Performance eligibility criteria and process that must be clarified and resolved.

First, while PJM's explanation for why it chose not to adopt "overly prescriptive" eligibility requirements might appear reasonable,⁷⁰ it is, in fact, disingenuous. As set forth in the proposed tariff, the eligibility criteria are: (1) the resource has either cleared an RPM auction or is otherwise committed as a capacity resource; and (2) the resource is obligated to delivery energy during the relevant Delivery Year as scheduled and/or dispatched by the Office of Interconnection during the Performance Assessment Hours." Proposed Tariff Section 5.5A(a). Performance Assessment Hour (for Capacity Performance Resources) is defined as each whole or partial hour for which PJM has declared an Emergency Action and "Emergency Action" means "any emergency action for locational or system-wide capacity shortages that either utilizes pre-emergency mandatory load management reductions or other emergency capacity, or initiates a more severe action including, but not limited to, a Voltage Reduction Warning, Voltage Reduction Action, Manual Load Dump Warning, or Manual Load Dump Action."

⁷⁰ See Filing Letter at 21-22.

Proposed Tariff Section 2.48A and 2.23A, respectively. In other words, all Capacity Performance Resources are required to produce energy whenever PJM calls on the resource, regardless of economic considerations, operation limits, or other circumstances. This would mean, for example, that even a combined cycle natural gas plant that has an extremely strong record of high availability as needed throughout the summer season, will likely not be capable of meeting the Capacity Performance eligibility requirements without being dual-fuel or having backup fuel on site. This is true because even if the generator has firm transportation agreements for the entire year (which is likely cost prohibitive for the generator and generally uneconomic for the LSEs and load that ultimately pay for capacity), the “human needs” requirements in virtually all natural gas tariffs, whether of an interstate pipeline or local distribution company, will trump electric generator contracts during emergencies that involve limited fuel supply.⁷¹ As discussed below, however, lack of fuel supply does not excuse Capacity Performance Resources from nonperformance and, as a result, the combined cycle generator would be subject to penalties in the form of the Non-Performance Charge. It is worth noting that in nonattainment areas, within which many generators sit, dual-fuel operation is simply *not an option* as the generator will be unable to obtain the necessary environmental permits. The generator is thus faced with the dilemma of risking penalties in the event that its fuel supply is curtailed or

⁷¹ It is well known that Local Gas Distribution companies allow for “human needs” curtailments. Interstate pipelines, however, also include “Human needs” provisions that place power generators at the highest risk for curtailment. *See*, for example, the Transcontinental Gas Pipeline Tariff (“Transco”), Section 13.2 (a) “Priority Use Curtailment. Any Buyer which requires other than pro rata curtailment under Section 13.1 for purposes of protection of priority use requirements shall file a request with Seller, with a copy to the Commission, requesting a determination that the service(s) for which it seeks protection qualifies under one of the following priority categories identified in Sections 401 and 402 of the NGPA.” The Columbia Gas Transmission (“TCO”) tariff contains a similar provision in the General Terms and Conditions section VII.32. Joint Protestors note that power generators are not among the categories that are eligible for curtailment protection in the Transco tariff and have the lowest priority protection in the TCO tariff.

attempting to demonstrate that it is incapable of being a Capacity Performance Resource and forgoing substantial revenue.

Second, PJM has unreasonably made itself the supreme arbiter of resource qualification.

In order to offer as a Capacity Performance Resource, sellers are required to represent that:

- The seller has made, or can and will make, the necessary investment to ensure the Capacity Performance Resource has the capability *for the entire relevant Delivery Year* to provide energy *at any time* when called upon by the Office of the Interconnection;
- The resource is capable of complying with the performance obligations as set forth in the Tariff;
- The resource meets the criteria for obtaining an exception to the Capacity Import Limit requirements if the resource is external to PJM; and,
- The resource will be capable of physical delivery in accordance with the rules by no later than the start of the applicable Delivery Year.

If sellers knowingly make false representations or representations that are otherwise inconsistent with the Capacity Performance requirements, in addition to potentially being subject to the server penalties, making such representations may also constitute a violation of, and may subject the Capacity Market Seller to penalties under, the PJM Market Rules and the FERC Market Rules.

Even if a seller makes the representations by submitting a Sell Offer into an RPM auction, both PJM and the IMM have reserved an unlimited data request ability to obtain and review any information so desired to evaluate whether they believe the resource can meet the operational and performance requirements of Capacity Performance. Thereafter, they have an unlimited and unilateral ability to reject a request for the resource to offer as a Capacity Performance Resource if the seller “does not demonstrate to the satisfaction of PJM that the resource meets the necessary requirements.” Filing Letter at 25. In the event that PJM

determines that the resource may not qualify as Capacity Performance, the seller's only recourse is with FERC. And, as discussed below, the reverse is true as per PJM's must offer requirements; a seller must demonstrate it cannot meet the requirements. From a practical standpoint, by the time the seller wades through a FERC process, it is likely that the seller would be unable to submit its Sell Offer into the auction anyway as PJM has only allotted 65 days prior to the auction to notify sellers of a rejection. *See* Filing Letter at 25.

The level of discretion that PJM has reserved for itself and the IMM is alarming. Rather than giving PJM and the IMM unlimited discovery authority, a unilateral ability to reject proposals, and ultimate discretion on what may offer as a Capacity Performance Resource, the eligibility requirements and process should be clear and understandable enough to eliminate both opportunities for conflict and manipulation by sellers and the necessity for PJM or the IMM to judge whether the resources qualify. Otherwise, the process will be unworkable, overly cumbersome and unjust and unreasonable.

B. Must-Offer Requirements

PJM's must-offer requirement is overly broad and ambiguous and, frankly, incapable of working in practice. PJM notes that there is market concentration in the capacity administrative construct and that, presently, the "must-offer" requirement is a "reasonable solution to the problem of possible physical withholding of Capacity Resources, which could otherwise be used as a tactic to reduce competition." Filing Letter at 58. PJM then appears to simply presume that a similar "must-offer" requirement for Capacity Performance Resources should provide a similarly reasonable solution to the potential problem of physical withholding. PJM observes:

[D]uring the two transition years, Capacity Performance Resources can be paid a higher price than Base Capacity Resources. The level of that price depends, in part, on the quantity of Capacity Performance Resources offered into the auction. Sellers with multiple resources that *could* qualify as

Capacity Performance Resources therefore may have an incentive to withhold some of those resources, and offer them only as Base Capacity Resources, in an attempt to increase the Capacity Performance Resource clearing price for the benefit of their other resources.⁷²

However, PJM ignores the fact that with the opportunity to offer resources into the auctions as multiple capacity products, even splitting single resources between the Base and Capacity Performance Resource capacity products, the physical withholding problem is exponentially more difficult to detect and demonstrate than with a single capacity product. Rather, PJM notes that “it is not enough for a seller with a Capacity Resource merely to offer it as a Base Capacity Resource. If the resource *can* be offered as a Capacity Performance Resource, it is critical that it in fact *is* offered as a Capacity Performance Resource.” Filing Letter at 59 (emphasis in original). PJM asserts that its must-offer requirement is required to prevent physical withholding which otherwise could be utilized to manipulate the market. *Id.* That is all well and good with one exception – the must-offer requirement is overly broad and so ambiguous that it is incapable of providing any protection of the sort PJM describes.

Specifically, PJM proposes that, beginning with the 2018/19 Delivery Year, the must-offer requirement applies to all RPM auctions for every Delivery Year such that the installed capacity of every capacity resource located in PJM that is “capable (or that reasonably can become capable) of qualifying as a Capacity Performance Resource shall be offered as a Capacity Performance Resource.” Filing Letter at 59; Proposed Tariff, Attachment DD, Section 6.6A(a).

⁷² Filing Letter at 59 (internal citations omitted, emphasis in original).

There are two exceptions to the must-offer requirement. Intermittent Resources, Capacity Storage Resources, Demand Resources, and Energy Efficiency Resources are not subject to the must-offer requirement – but they may elect to offer as Capacity Performance resources if they can meet the eligibility requirements. Filing Letter at 60-61; Proposed Tariff, Attachment DD, Section 6.6A. Additionally, if a seller can demonstrate that its resource is “reasonably expected to be physically incapable” of satisfying the Capacity Performance requirements, it may obtain an exception to the must-offer requirement. Filing Letter at 60; Proposed Tariff, Attachment DD, Section 6.6A.

While the first exception is straight-forward enough, the second is virtually incomprehensible. PJM attempts to explain that being physically incapable does not mean that it is economically infeasible to meet the requirements. PJM specifically states that an exception to the must-offer requirement will not be awarded “simply because the seller declines to make the investments, or allocate the operating budget, need to bring the resource’s performance up to the necessary level.” Filing Letter at 60. Rather, regardless of cost, an exception would only be awarded if, for example, new fuel delivery infrastructure is required and it cannot be arranged, permitted or completed in time for the Delivery Year. *Id.* In order to obtain such an exception, sellers must submit a request for an exception with all supporting information by no later than 120 days before the offer window opens for the relevant auction. The IMM will review the request and PJM will make a final determination no later than 65 days before the auction offer window. *Id.*; Attachment DD, section 6.6A(c). This means that for the 2015 BRA conducted in May, sellers should have submitted their exemption requests by January 11, 2015. PJM clarifies, in a footnote, due to the imminence of the deadline when it made its filing, PJM will “entertain and process requests for exceptions to the Capacity Performance Resource must-offer

requirement while this filing is pending.” Filing Letter at n.172. However, if a seller fails to submit an exception request during the pendency of this proceeding or should PJM deny such a request, and if the Commission accepts PJM’s proposals without change, then “the must-offer requirement *will apply* to the 2015 BRA.” *Id.* (emphasis in original). In other words, in spite of the enormous controversy surrounding the Capacity Performance filing and the uncertainty about how the Commission will respond to it, sellers that fail to request or receive an exception in accordance with PJM’s unilaterally specified and not-yet-approved deadline will “face various sanctions, including a ban on submitting offers in certain other RPM Auctions.” Filing Letter at 58. There is no way to describe this process other than wholly unreasonable, completely impractical, and downright Kafkaesque.⁷³

PJM requested an April 1, 2015 effective date for its filing. Under PJM’s proposed must-offer exemption process, PJM expects each of its potential market sellers to undergo a comprehensive and complex analysis of each and every resource and make a determination of: (1) whether it can meet the Capacity Performance requirements; (2) if not, what it would take to meet the requirements, which could range all the way from adding new fuel delivery and/or storage infrastructure, enabling new fuel source capabilities, engaging with fuel suppliers for new and revised contractual agreements, to permitting processes and requirements; and, (3) determining the cost of such options (although irrelevant for the purpose of meeting the eligibility requirements, cost is very relevant to the offer submission). This complex analysis cannot be done in isolation. Moreover, it must be completed while trying to understand PJM’s

⁷³ Taken together, PJM’s must-offer obligation and exception process can create a Catch 22 for a Market Participant seeking an exception if it believes it cannot meet the requirements of a Capacity Performance Resource. Should PJM deny an exception request, the Market Participant would have no choice but to then represent as per Attachment DD, Section 5.5A i) that it can meet the requirements it has already determined are unachievable.

proposal and how it works with the barrage of additional capacity-related filings that PJM has made over the last six weeks. These are major undertakings that will guide sellers' business operations for years to come and should not be done lightly or hurriedly. Moreover, sellers who are committing time, effort and resources to comply with PJM's directive are at risk of wasting those efforts in the event that the Commission rejects or modifies PJM's proposal. Even for those sellers who do attempt to comply, PJM's proposal fails to provide either adequate time or guidance and punishes all sellers by banning them from participating in future auctions if they fail to meet PJM's markedly impractical deadlines. This is the epitome of unjust and unreasonable and the Commission must recognize it as such.

While this element of PJM's proposal is reason enough to reject the filing – a step that Joint Protestors strongly recommend – the only remedy that could mitigate the unreasonableness of this proposal is to delay its implementation to allow sellers sufficient time to make the determinations required to either request an exception or move forward with a rational, well-analyzed sell offer.

C. Transition Incremental Auctions for the 2016/17 and 2017/18 Delivery Years.

PJM states that it will hold a Capacity Performance Transition Incremental Auction (“TIA”) for each of the 2016/17 and 2017/18 Delivery Years in order to facilitate the shift towards Capacity Performance Resources. *See* Filing Letter at 29. The TIAs will be in April and May of 2015 to procure 60 and 70 percent of the Reliability Requirement, respectively, in the TIAs. *Id.* PJM also describes participation in the TIAs as voluntary, noting that there is no requirement for resources to be offered. *Id.* PJM candidly points out that sellers who commit as Capacity Performance Resources in the TIAs “will be exposed to the substantial risks associated

with the new Non-Performance Penalties” and that sellers should not “take this commitment lightly.” *Id.* at 29-30.

There is a logical disconnect between PJM’s recognition of the seriousness of the commitment and the time within which sellers are required to make the commitment. PJM hopes to run auctions in less than three months from the time of this filing so there is little time for sellers to make any concrete investments that may be required in order to comply or to even make a thorough assessment of whether and what type of investment might be prudent.

Additionally, while PJM indicates that its goal is to procure 60% and 70% of the region’s Reliability Requirement for the 2016/17 and 2017/18 Delivery Years, respectively, it is unclear whether there are enough resources available and willing to volunteer as Capacity Performance Resources to meet those goals. This is particularly true since the clearing price for the TIAs is capped at 50 and 60 percent of the Net CONE for the PJM Region as established for the BRA of that Delivery Year, respectively, regardless of whether the target amount of Capacity Performance Resources is cleared. Filing Letter at 31. The likely result of this structure, given the risks and clearing price caps, is that a subset of existing resources, particularly those that are already capable of meeting the Capacity Performance eligibility requirements, will receive a significant increase in compensation for the capacity resources they have already committed to provide. It would be unreasonable and fundamentally unfair to require that loads pay those suppliers additional money for the same capacity resources they have already committed to provide, especially where doing so would provide no additional benefits in return for the additional costs.

In order to remedy this deficiency in the Capacity Performance Proposal, the Commission should reject the TIAs as proposed and direct PJM to conduct a reliability study

with winter ratings. Additionally, the Commission should direct PJM to consider uncleared resources that could contribute towards reaching PJM's reliability targets and to continue the various other already existing initiatives PJM has underway as discussed above. Furthermore, in Docket Nos. AD12-12 and RM14-2, the Commission also has undertaken significant efforts to understand, address and improve coordination in electric and gas scheduling practices. The Commission should direct PJM to ensure that its proposal is consistent with any directives that result from the Commission's own efforts to harmonize gas industry and electric industry scheduling and operating practices. Finally, if PJM's Capacity Performance proposal is not rejected entirely (the treatment we urge), then the Commission should allow sufficient time for sellers to determine whether and to what extent prudent investments are required by delaying the TIAs until late 2015 at the earliest for the 2016/17 Delivery Year and mid-2016 for the 2017/18 Delivery Year so sellers would have time to discern the compliance criteria and eligibility requirements prior to committing as Capacity Performance Resources.

D. Transition Plan for Delivery Years 2018/19 and 2019/20.

To continue the transition to the exclusive use of Capacity Performance Resources, PJM proposes to allow both Base Capacity Resources and Capacity Performance Resources to clear in the BRAs for the 2018/19 and 2019/20 Delivery years that will be held in May of 2015 and 2016, respectively. Filing Letter at 32. Here, too, the time available before sellers must make a commitment to offer as either Base Capacity or Capacity Performance is insufficient for thorough examination and informed decision-making. Once again, PJM's "hell bent for leather" approach to implementing Capacity Performance subjects market participants to substantial unnecessary risk for no valid reason.

Equally troubling is the lack of market power mitigation, especially during the transition period when there are two capacity product choices available to market sellers. As noted above, PJM concedes, as it must, that there is market concentration in the capacity administrative construct. Filing Letter at 10. PJM also recognizes the increased potential for physical withholding during the transition period. PJM notes that its must-offer requirement is “essential” to mitigating the withholding risk. Nonetheless, PJM proposes to relax the offer limits from the Avoidable Cost Rate (“ACR”) less expected net energy and ancillary service market revenues to the applicable Net Cost of New Entry (“CONE”) in order for sellers to recover the costs, investments, and expenses needed to ensure that their resources can perform during emergencies occurring at any time of the year. Filing Letter at 54. PJM goes as far as revising its tariff to make explicit that any Sell Offer with an Offer Price at or below Net CONE “*shall not, in and of itself, be deemed an exercise of market power in the RPM market.*” Proposed Tariff at Section 6.4(a) of Attachment DD (emphasis added). PJM claims that removing any color of market power when Sell Offers do not exceed Net CONE is necessary and appropriate to “eliminate a possible disincentive to potential sellers of Capacity Performance Resources committing to the capital and operating expenses they need to improve performance.” Filing Letter at 55.

This shift in acceptable Sell Offers results in a major and fundamental shift in the structural market power opportunities available in RPM in that sellers are no longer limited to their avoidable costs but will not be investigated for market power mitigation unless their offers exceed Net CONE. In spite of this fundamental shift, PJM did not make any corresponding revisions or modifications to the market power mitigation provisions in its tariff. Rather, PJM appears to be relying on the penalty provisions for mitigation. As discussed herein, there are other deficiencies and concerns with the penalties, but the important point here is that it is

unreasonable to rely solely on those penalties to serve as a deterrent to exercising market power, particularly when PJM has effectively raised the limits and removed any opportunity to even question market sellers' offers without them exceeding Net CONE. PJM's lack of market power mitigation coupled with its increase in market offer caps is unjust and unreasonable.

E. Single Capacity Performance Product for the 2020/21 Delivery Year and Beyond

Beginning in the 2020/21 Delivery Year, all capacity resources must qualify as Capacity Resources and thus, there is a single capacity product. Filing Letter at 32. From the perspective of avoiding gaming, convergence on a single capacity product may be preferable to having both the Base Capacity and the Capacity Performance products side by side; however, PJM's filing would compel purchases of higher volumes of the premium product while needlessly burdening the use of resources such as Demand Response and intermittent and renewable resources.

An alternative approach that better addresses PJM's stated concerns may be to develop a six-month winter product and a six-month summer product. Such an approach would, at the very least, provide a more realistic recognition of both the operational limitations of existing resources (*e.g.*, limited duration Demand Resources) and the benefits of existing resources (*e.g.*, increased winter capability). Additionally, PJM could perform separate reliability assessments for the very different load and resource mix during winter versus summer periods. This would avoid over-procurement during the non-critical season.

F. Impacts on Use of Demand Response, Intermittent and Renewable Resources

As noted in Section III.B.1 above, PJM's filing incorporates an option for certain types of resources to submit "coupled" sell offers, the notion being that resources which may not meet the Capacity Performance eligibility requirements on their own can "couple" with other such

resources and offer as a single Capacity Performance resource. Filing Letter at 33. The coupling provision, however, requires that the resources be located in the same LDA and be owned or controlled by the same capacity market seller.

By forcing resources to co-locate and combine to meet annual Capacity Performance requirements rather than PJM combining resources procured through the auction process, PJM's proposal unreasonably shifts the risks and burdens of combination to market sellers.

Additionally, the coupling mechanism is unduly complicated, such that, in the end, the handful of resource types permitted to utilize the approach are likely to be deterred from participating in RPM as Capacity Resources. It is in that sense that, as we argue above, PJM's proposal unduly discriminates against Demand Response, intermittent and renewable generation resources. This unjustified adverse distinction is especially troubling given the important role that Demand Response played, voluntarily, in helping PJM meet its capacity needs during the 2014 winter weather events.⁷⁴ It also makes little sense for PJM to take actions that reduce the opportunities for Demand Resources and intermittent and renewable resources to qualify as Capacity Resources when stringent environmental regulations are compelling increased reliance on those same types of resources (*see* Section III.B.2, *supra*).

⁷⁴ *See* PJM Operational Analysis, *supra* note 31, at 20-21:

Demand response, although not required to respond during the winter this year, did respond and assisted in maintaining the reliability of the system. In fact, the total amount of demand response provided was larger than most generating stations. During the Polar Vortex, PJM called on demand response three times – the morning and evening of January 7 and the morning of January 8 throughout the RTO. Even though demand resources were not obligated to respond during this period, close to 25 percent of the demand response resources registered in PJM did respond and helped PJM manage the grid on the all-time winter peak day. This experience demonstrates the year-round value of demand response.

Again, as discussed above, an alternative approach could be for PJM to develop a six-month winter product and a six-month summer product. If necessary, implementation of the 2016 BRA should be delayed in order to explore the possibility of holding separate summer and winter auctions or to find a way to make the dual Capacity Performance and Base approach (like what will be used for the 2016-17 and 2017-18 Delivery Years) work on a more permanent basis. Note, however, that for the dual Capacity Performance and Base approach to work, the must offer and mitigation issues described above must be resolved.

G. Elimination of Excuse for NERC OMC Events

The North American Electric Reliability Corporation (“NERC”) created specifications for certain types of outages to be deemed Outside Management Control (“OMC”). Currently, an outage can be classified as an OMC outage only if the outage meets the requirements outlined in Appendix K of the “Generator Availability Data System Data Reporting Instructions.” Appendix K of the “Generator Availability Data Systems Data Reporting Instructions” also lists specific cause codes that are standardized for specific outage causes. The IMM explained, “Not all outages caused by the factors in these specific OMC cause codes are OMC outages. For example, according to the NERC specifications, fuel quality issues (codes 9200 to 9299) may be within the control of the owner or outside management control. Each outage must be considered separately per the NERC directive.” 2012 State of the Market Report for PJM at 163-164. Currently, PJM excludes OMC outages from the calculations used to determine the level of unforced capacity (or “EFORd”) for specific units that must be offered in PJM’s Capacity Market.

In its proposal, PJM proposes to discontinue treating what are considered OMC events differently for purposes of calculation the EFORd and PHPA Charge calculations beginning with

the 201-19 Delivery Year. Further, PJM will begin counting OMC events as outages for purposes of calculating the forced outage rate for peak-hour period penalties.

While the Joint Protestors understand the rationale for removing OMC codes when there are alternate means available to substantially mitigate or eliminate the events for which the OMC codes have been used in the past, certain events are not within the control of the operator. It is certainly appropriate to employ OMC codes in the context of events which have no remedy or are entirely outside of the control of the operator; particularly those which can be attributed to an act of nature over which operators have no control. For example, in the case of run-of-river resources, by their very nature, they are subject to variability of performance caused by weather. Thus, where the NERC GADS guidelines in Appendix K describe OMC lack of fuel as “lack of fuel where the operator is not in control of contracts, supply lines, or delivery of fuels,” as the fuel source for hydroelectric units is the river, lack of fuel certainly is not within their control. No contracts, supply lines or deliveries and no amount of investment can change that.

Similarly, until the Commission resolves the persistent disconnect between gas and electric scheduling requirements that prevent effective gas-electric coordination, it is not unreasonable to retain fuel unavailability as a permitted OMC event for single-fuel resources. Rather than eliminating the use of OMC events altogether, which is an extreme response to a limited concern, the Commission should direct PJM to revise its use of OMC codes to eliminate only broad, general application to all generators. Such limitations of the use of such codes would preserve the intention of the IMM and PJM in removing the OMC codes – to force generators to be more reliable where it is within their ability to do so.

The PJM IMM has also argued that PJM does not have a clear, documented, public set of criteria for designating outages as OMC. Joint Protestors appreciate the need to not only limit

the OMC codes, but also to clarify them. Following through with the above example of a hydroelectric resource, the following three OMC codes could be revised as set forth below and retained for run-of- river resources:

Code	Current Description	Proposed Description
9000	Flood	High Water Conditions (hydro)
9135	Lack of water (hydro)	No change
9320	Other miscellaneous external problems	Debris (hydro)

The retention of these codes should provide a tool for the generation resources to more accurately reflect high reliability factors based on actions within operator control. A revision instead of a total elimination would also allow for availability of resource capability to the system when PJM needs all the generation it can muster in times of alerts or shortages.

H. The Capacity Performance Proposal Would Impose Excessive New Penalties on Resource Owners When More Targeted Changes to Existing Penalty Provisions Could Suffice.

In devising a penalty mechanism in this context, the balance to be struck is between penalties that are strong enough to discourage unwanted conduct but not so onerous as to either drive away capacity suppliers or impose such risks that the price premium they are forced to recover is prohibitive. Here, we are concerned that the penalties PJM proposes as part of Capacity Performance fall on the latter side of the line -- that is, they would require suppliers to either exit the market or include exorbitant risk premiums in their sell offers. Imposition of penalties up to Net CONE, as proposed, could force a resource owner to lose a large part of its annual capacity revenue in one fell swoop, notwithstanding the proposed “stop loss” provisions. Joint Protestors are concerned that the unintended consequence of PJM’s proposal will be either

excessively high clearing prices in the RPM auctions or reduced competition for capacity supply, and quite possibly both.⁷⁵

In Section III.G above, Joint Protestors outline a set of more modest adjustments in PJM's existing penalty structure that will, we believe, promote improvements in operational performance as an adjunct to the targeted initiatives PJM already has underway to increase unit availability and dispatch response during extreme weather. We will not repeat that list here, but simply reiterate that current initiatives are already producing improvements in operational performance without the threat of potentially back-breaking penalties. Suddenly shifting over to a mechanism that relies exclusively on large financial penalties is more likely to promote exit from the market than it is a continuation of ongoing performance improvements.

I. Increases in Credit Requirements Due to Higher Penalty Exposure.

Related to PJM's proposal for sharply increased non-performance penalties is the impact of that change on the credit requirements capacity sellers must satisfy. In general terms, it seems logical that, as a market participant's potential obligations to PJM go up, appropriate adjustments should be made in that party's financial assurance arrangements. Where credit requirements are unduly inflated by the effect of an excessive penalty structure, however, the increased costs to provide financial assurance simply become an additional factor that could push a potential

⁷⁵ Almost certainly in recognition of problems created by the severity of the penalties it proposes, PJM states in its filing that it seeks add to the Avoidable Cost Rate formula a new element on "Capacity Performance Quantifiable Risk," consisting of "the documented and quantifiable costs of mitigating the risks associated with submission of a Capacity Performance Resource offer, such as insurance expenses solely attributable to the risk of being a Capacity Performance Resource." *See* Filing Letter at 58. The suggestion seems to be that a resource owner could insure against Non-Performance Penalties and thereby avoid pricing itself out of the market with an exorbitant risk premium in its offer price. PJM provides no information, however, about the availability of such an insurance product or its cost. The notion that resource owners might be able to insure against Non-Performance Penalties is interesting but speculative on PJM's part.

capacity seller to leave the market. Reduced participation in the RPM auctions, in turn, will put additional upward pressure on clearing prices, to the ultimate disadvantage of load.

PJM's filing gives little confidence that the RTO has considered, let alone carefully examined, the dual burden on resource owners of exposure to higher penalties coupled with higher credit requirements and costs. Again, the solution, we submit, is a more reasonable penalty structure placed into effect in combination with ongoing initiatives to improve operational performance. Given that the costs of an excessive penalty structure eventually will be paid by load in the form of higher prices, a more moderated approach is warranted.

V. THERE IS NO NEED FOR A TRANSITIONAL MECHANISM FOR DELIVERY YEARS FOR WHICH A BRA ALREADY HAS BEEN CONDUCTED.

PJM proposes a number of transitional mechanisms and steps that would be implemented during the period over which existing Capacity Resources are converted to Base Capacity Resources and then phased out, such that Capacity Performance becomes the sole PJM capacity product in the 2020/21 Delivery Year. Notably, PJM would apply its transitional mechanisms to Delivery Years for which Capacity Resources already have been cleared through the applicable Base Residual Auctions (namely, 2016/17 and 2017/18). In fact, PJM plans to hold so called "Capacity Performance Transition Incremental Auctions" for those Delivery Years in hopes of securing, through voluntary offers, 60% and 70% of the PJM Region's Reliability Requirement, respectively, as that value is updated when the auctions are run.⁷⁶

Joint Protestors are aware that detailed comments on PJM's proposed transitional mechanisms will be submitted by the parties that engaged in the Enhanced Liaison Committee process as the Transition Coalition. We endorse those comments and will not repeat that

⁷⁶ See Filing Letter at 27.

coalition's important comments here. Rather, Joint Protestors highlight a few key concerns regarding PJM's transitional mechanisms, which we ask the Commission to consider in evaluating PJM's proposal.

PJM's filing does not propose any changes for the 2015/16 Delivery Year. Strictly from a resource adequacy perspective, the 2015/16 Delivery Year is likely to be the most critical in the transition period; however, due to planned retirements and other factors. PJM already has taken steps to ensure it will have the resources it believes it will need to serve load in that year.⁷⁷

As for Delivery Years 2016/17 and 2017/18, there is no indication in the filing that PJM will face a shortage of Capacity Resources in those years, or that the operational performance of Capacity Resources will be worse in those years than in any other year. While PJM has publically and frequently expressed its resource adequacy concerns for the 2015/16 Delivery Year due to retirements associated with MATS compliance, there has been no expression of need for additional capacity for the 2016/17 and 2017/18 delivery years. Indeed, according to the BRA results posted by PJM for the forward auctions conducted in 2013 and 2014, there is a surplus of 5.4 and 2.8 GW for the 2016/17 and 2017/18 Delivery Years, respectively.⁷⁸

In light of the foregoing, there is no reason why PJM should perceive a need to procure 60% and then 70% of the region's resource requirement as Capacity Performance in those two years. All that will be accomplished by PJM's transitional auctions in those years is to pay a windfall to resource owners that already had an obligation to provide capacity in 2016/17 and

⁷⁷ In Docket Nos. ER15-738 and ER15-739, PJM has filed for Commission authorization to (i) enter into out-of-market contracts with generation resources that otherwise would retire during the 2015/16 Delivery Year, and (ii) retain 2000 MW of excess procurement that it otherwise would have been required to turn back to the market at the next Incremental Auction for DY 2015/16.

⁷⁸ Links to the auction results are available at <http://www.pjm.com/markets-and-operations/rpm/rpm-auction-user-info.aspx>.

2017/18 because their resources cleared the BRAs for those years. The situation could be likened to that of a person who strikes a deal to sell his house, signs the contract, and then, just before closing, demands a higher price. The difference, of course, is that in this instance, rather than the seller demanding a higher price, the “buyer” (PJM) is rushing forward to unilaterally *offer* a higher price. In the absence of a demonstrated need to procure resources in those two years that are somehow more reliable or more likely to be continuously available than the resources already committed for those years – and bearing in mind that the resources that offer into the new transitional auctions are likely to include many of the same resources that already cleared and committed in the applicable BRAs – the prudence of PJM’s decision to run the transitional auctions as proposed is questionable, to say the least.⁷⁹

Additionally, if changed circumstances arose such as to require the procurement of additional capacity for Delivery Years 2016/17 and 2017/18, there are far less costly ways to do so than what PJM proposes. Indeed, as matters stand, the “conventional” incremental auctions are the vehicle through which PJM is to obtain additional capacity if the amount procured in the BRA becomes inadequate as the Delivery Year draws near. The capacity that could be obtained through the existing incremental auction mechanism is certain to be less costly than the Capacity Performance Resources that PJM instead has decided to buy through its proposal to run Capacity Performance Transition Incremental Auctions for 2016/17 and 2017/18.

⁷⁹ Joint Protestors also point out that PJM’s notion of what constitutes a binding commitment appears to be situationally determined. In the context of Capacity Performance Resources, PJM contends that an offer to sell capacity constitutes a “contractual representation,” binding on the seller, on which PJM will rely in deciding whether to accept an offer. *See* Filing Letter at 24-25. Yet, when it comes to resources that have already cleared in a BRA, PJM apparently has no compunctions about tearing up the contract that was struck when a seller’s offer cleared, so that the seller may then sell the capacity to PJM at a higher price in the form of a Capacity Performance Resource. PJM’s shifting view of what constitutes a binding obligation does not serve to enhance its credibility in this docket.

VI. THE CONCERNS PJM CITES AS MOTIVATION FOR ITS CAPACITY PERFORMANCE PROPOSAL DO NOT JUSTIFY ELIMINATION OF THE SHORT-TERM RESOURCE PROCUREMENT TARGET.

As part of its Capacity Performance proposal, PJM seeks to eliminate the Short-Term Resource Procurement Target (more commonly referred to as the “2½% holdback”) from the RPM construct. According to its filing, PJM’s primary reason for doing so is that the 2½% holdback is no longer needed. Thus, PJM states that the 2½% holdback was introduced to ensure RPM participation for short-lead time resources that can better commit one or two years in advance of a Delivery Year, as opposed to the three years needed for BRA participation. PJM now contends that the holdback is no longer needed because: (1) the three-year forward aspect of the BRA has proved to be little impediment to the participation of short-term resources such as demand response, energy efficiency, generator uprates, or external resources;⁸⁰ and (2) recent PJM load forecast adjustments will reduce the peak load forecast for the 2018/19 Delivery Year by 2.5 to 3.0 percent, so the holdback is no longer needed as a way to address load forecast error.⁸¹ Finally, PJM states that the holdback should be eliminated for policy reasons because it suppresses clearing prices in the BRA.⁸² None of the reasons PJM offers for eliminating the 2½% holdback has merit.

Elimination of the 2½% holdback has no relationship to the improvements in operational performance that PJM touts as the purpose of its latest RPM overhaul. It entered the discussions only toward the very end of the limited coalition/Board process, and was not presented as being functionally integrated with other elements of the proposal. If elimination of the holdback was a

⁸⁰ Filing Letter at 75.

⁸¹ *Id.* at 76.

⁸² *Id.*

quid pro quo for supplier acquiescence to other elements in the proposal, that was not disclosed to the participating load representatives. In any event, eliminating the holdback adds cost, but no value, to the Capacity Performance filing and should be rejected by the Commission for several reasons, including the following.

First, PJM fails to provide any explanation of how eliminating the 2½% holdback will help to improve the operational performance of capacity resources in PJM. In reality, there is no connection at all between the objectives that ostensibly prompted the filing of PJM’s Capacity Performance proposal and the outcomes that would follow elimination of the holdback.

Although it is undeniable that eliminating the holdback would put upward pressure on capacity auction clearing prices, the extra cash-flow would go to *all* resources that clear regardless of whether they are in the position of needing to make investments for improved performance. Consequently, eliminating the holdback would provide a windfall to resources that already have full capability to perform in emergency conditions and are already fully compensated for their ability to perform accordingly.

Second, regarding PJM’s “policy” argument that the holdback should be eliminated because it suppresses clearing prices, Joint Protestors are at a loss to identify any expressly stated Commission policy that favors higher capacity prices simply because they are higher. As far as we know, it remains the Commission’s view that price increases must compensate for costs or serve some other legitimate purpose. In any event, PJM offers no evidence that the 2½% holdback has had the effect of pushing down the prices at which PJM’s capacity auctions have cleared. Indeed, as recently as May 7, 2014, in a response to the IMM’s 2013 *State of the Market Report*, PJM asserted *precisely the opposite view*. It there stated:

Based on analysis of RPM performance since 2007, the 2.5 percent deferred supply does not unreasonably lower

capacity procurement, rather it is a mechanism to provide opportunity for short-term resource participation and to prevent systematic over procurement of capacity. Actual market performance and comparison of 3.5 year forward load forecast to actual load requirements appear to validate the deferred supply procurement mechanism. Based on this analysis, *PJM does not believe there is evidence that the 2.5 percent deferred supply artificially or inappropriately suppresses forward capacity prices.* In fact, the 2.5 percent deferred supply appears to be a conservative quantity of supply deferral that properly reflects the dynamics of forward load forecasting and prohibits over-procurement of forward capacity and overstatement of forward capacity prices.⁸³

Yet, now -- only months later -- PJM advances the very position it so recently rejected; PJM, however, conveniently ignores its own inconsistency and makes no attempt to explain its reversal of position. Indeed, PJM bases its claim that the holdback “suppresses” BRA clearing prices on *the very same IMM arguments* that PJM refuted last May. The Commission should view PJM’s unexplained reversal of position with great skepticism – skepticism that would fairly and properly extend to PJM’s other stated justifications for eliminating the 2½% holdback, as well.

Second, the Commission’s orders restricting capacity imports and limited-availability Demand Resources – cited by PJM⁸⁴ as demonstrating that short lead-time resources are freely offering into the BRA – do not support elimination of the holdback. In fact, PJM’s argument could just as plausibly prove the opposite proposition – *viz.*, that the holdback should be retained in light of the robust participation in incremental auctions it has elicited. PJM itself has defended

⁸³ PJM’s Response to the 2013 State of the Market Report (May 7, 2014) (posted at <http://www.pjm.com/~media/documents/reports/20140507-pjm-response-to-the-2013-state-of-the-market.ashx>), at 12 (emphasis added).

⁸⁴ Filing Letter at 75, 76 nn. 211, 212.

the need to allow resources that cannot feasibly commit three years in advance, or that simply do not exist at the time of the BRA, to participate in RPM through robust incremental auctions.⁸⁵

The Commission, too, has expressed concerns regarding the ability of short-term resources to participate in RPM and for that reason directed PJM to revise the allocation of the holdback so that a substantial amount of short-term resources have an opportunity to be procured in the final incremental auction.⁸⁶ The holdback remains essential to ensuring the robustness of the incremental auctions.

Third, PJM fails to support its claim that the load forecast adjustments referenced in its filing will resolve the systematic over-procurement of resources. In fact, as recently as May of last year, PJM stated with respect to these load forecast adjustments that “more analysis will be needed in the future to determine the impacts of these changes on forward load forecasting.”⁸⁷ Even if those adjustments produce a 2.5 to 3.0% reduction in the peak load forecast, as PJM claims, the inherent uncertainty of forward-looking forecasts remains. To the point, the affidavit of Thomas A. Falin, included in PJM’s filing, points to the likelihood that the PJM load forecast still is likely to result in over-procurement.⁸⁸ The holdback should be retained as a way to offset some measure of remaining forecast uncertainty.

Finally, it should be recalled that the 2½% holdback was an essential part of a settlement that was negotiated to replace the former Interruptible Load for Reliability mechanism.⁸⁹

⁸⁵ “Answer of PJM Interconnection L.L.C. to Protests and Comments,” Docket No. ER09-412-000 (February 2, 2009), at 41.

⁸⁶ *PJM Interconnection L.L.C.*, 126 FERC ¶ 61,275 (2009) at P85.

⁸⁷ PJM Response to the 2013 State of the Market Report, *supra* note 83, at 12.

⁸⁸ PJM Filing, Attachment C, at 12 (explaining that PJM uses the very conservative “90/10” load forecasts).

⁸⁹ *PJM Interconnection L.L.C.*, 126 FERC ¶ 61,275 (2009) at 83.

Consistent with applicable Commission precedent,⁹⁰ PJM should be required to prove that eliminating the holdback is necessary to prevent harm to the public interest. Far from meeting that burden, PJM has not even provided a basis for the Commission to conclude that elimination of the holdback is “just and reasonable” (PJM’s burden of proof under Section 205 of the Federal Power Act). PJM offers no evidence or support that would validate a finding that elimination of the 2½% holdback is just and reasonable because PJM has: (1) departed without explanation from its prior, and very recent, assessments of the impacts and value of the holdback; (2) provided no evidence to show that short-term resources will not be adversely impacted by the holdback’s elimination; and (3) failed to indicate how it plans to address the inherent uncertainties of forward looking forecasts in the absence of the holdback. Because PJM has failed to show that eliminating the 2½% holdback is just and reasonable, the holdback should be retained as an essential component of RPM.

VII. DUE TO PJM’S FAILURE TO DEFINE THE SPECIFIC CHARACTERISTICS OF A CAPACITY PERFORMANCE RESOURCE, EXCESSIVE DISCRETION WOULD BE VESTED IN PJM.

For a portion of its consideration of Capacity Performance, PJM proposed to specify certain required attributes of a Capacity Performance Resource, such as the firmness of primary fuel transportation arrangements and the availability of back-up fuel sources. PJM states in its filing, however, that it eventually made a decision not to be “overly prescriptive” about the required characteristics of a Capacity Performance resource.⁹¹ Instead, PJM’s proposal now

⁹⁰ *Equitrans, L.P.*, 104 FERC ¶ 61,008 (2003), *order on reh’g*, 106 FERC ¶ 61,013 (2004), *order on appeal*, *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404 (D.C. Cir. 2005) (FERC established that it will not disturb a settlement it has approved over the objections of parties to the settlement unless special circumstances exist which dictate that the public interest will be served by abrogating the settlement).

⁹¹ Filing Letter at 22.

provides that “a Capacity Performance Resource must be capable of sustained, predictable operation that allows the resource to be available to provide energy and reserves whenever PJM determines an emergency condition exists.”⁹² The mechanism for imposing this requirement is PJM’s declaration that, in submitting a sell offer for a Capacity Performance Resource, a seller is representing, among other things, that it “has made, or is capable of demonstrating that it will make, the necessary investment to ensure the Capacity Resource has the capability for the entire such Delivery Year to provide energy at any time when called upon by the Office of the Interconnection.”⁹³ PJM reserves the right to request information from a Capacity Market Seller and reject a request for the resource to offer as a Capacity Performance Resource if the seller “does not demonstrate to the satisfaction of the Office of the Interconnection [*i.e.*, PJM] that the resource meets the necessary requirements.”⁹⁴

Joint Protestors are deeply concerned by the extent to which the Capacity Performance filing would put PJM in the position of making such highly discretionary determinations. A standard that relies on “the satisfaction of PJM” is really no standard at all. Worse, the avenue for potential relief PJM would offer a rejected seller – the opportunity to seek recourse from the Commission before the applicable auction is run – is essentially meaningless. PJM states that it “proposes to provide the Capacity Market Seller, as well as the IMM with any determination to reject an offer no later than 65 days prior to the commencement of the offer period for the relevant RPM Auction.” As a practical matter, given the inherently subjective nature of the standard and the degree of discretion it would afford PJM, it is highly unlikely that a rejected

⁹² Filing Letter at 22.

⁹³ Tariff, Attachment DD, section 5.5A(a)(i)(A); Filing Letter at 23.

⁹⁴ Tariff, Attachment DD, section 5.5A(a)(ii)(B); Filing Letter at 25.

seller would be able to submit and adjudicate to finality a claim for relief at the Commission within 65 days.⁹⁵ Thus, the remedy for a seller disappointed by PJM’s exercise of its “satisfaction” discretion is likely to be an empty one. PJM’s rejection therefore would effectively preclude a seller from offering into the auction, an outcome likely to have significant adverse financial impacts for the seller. In the view of Joint Protestors, PJM should not be able to impose such a *de facto* financial penalty based on the exercise of unreviewable discretion. Such a result would violate due process were it the product of actions by a governmental agency; it offends due process no less (indeed, much more) for a non-governmental entity to be given such authority.

PJM’s authority to reject a capacity sell offer not to its “satisfaction” is not the only respect in which the Capacity Performance filing would vest PJM with excessive discretion. A similar concern presents itself in PJM’s authority to reject an external resource offer based on its view that the resource is not “reasonably expected” to be pseudo-tied by the start of the relevant Delivery Year.⁹⁶ Other examples undoubtedly exist, but these should be sufficient for the purpose of alerting the Commission to the problem. If the Capacity Performance filing is not rejected, PJM must be required to modify its proposal to remove provisions that would give PJM such broad discretion and authority, or else to build in recourse mechanisms that would have actual value for a market participant adversely affected by one of PJM’s exercises of its discretion.

⁹⁵ Although the Tariff provides also provides a market seller 65 days to challenge an adverse PJM determination applying the Minimum Offer Price Rule, that is a far different situation than the one discussed in text, involving clearer and less subjective criteria that are less subject to the exercise of PJM’s discretion. Adjudication of matters involving ambiguous standards and broad discretion necessarily take longer.

⁹⁶ See Tariff, Attachment DD, section 5.14D(B)(3); Filing Letter at 30.

VIII. THE COMMISSION SHOULD REJECT PJM’S PROPOSAL TO INCREASE THE CAPACITY SELLER OFFER CAP TO FULL NET CONE.

PJM’s filing also proposes to modify a number of the pricing terms applicable to Resource Capacity, including the level of the offer cap binding on capacity sellers. PJM explains:

So that sellers of Capacity Performance Resources can submit offers that recover the costs, investments, and expenses needed to ensure that their resources can perform during emergencies occurring at any time of year, PJM proposes to increase the Market Seller Offer Cap for Capacity Performance Resources to the applicable Net Cost of New Entry.⁹⁷

Submitted offers would not be subject to scrutiny for possible market power mitigation, and it is therefore not unreasonable to expect that an increasing number of resources will clear at or very near to Net CONE as time goes on.

PJM’s rationale for the price cap increase is that the costs of assuring resource availability will vary widely depending on a unit’s location and other factors, and that, rather than PJM and the IMM attempting to verify the legitimacy of each resource’s costs, “it makes sense to allow market participants to find the least cost manner to ensure performance.”⁹⁸ PJM thus appears to contemplate that a market seller will devote some or all of the difference between Net CONE and the seller’s actual costs to funding facilities and equipment that ensure the availability of its resource.⁹⁹ That premise, however, is wholly speculative. A seller might use

⁹⁷ Filing Letter at 54.

⁹⁸ *Id.*

⁹⁹ *See id.* (“[T]he corollary to making sellers strictly responsible for resource performance is that sellers will determine what measures, and at what cost, are needed to ensure that their resources perform. The offer cap rules should allow sellers, within reason, room to make that determination ...”), and *id.* at 55 (clarifying that offers up to Net CONE will not, standing alone, be deemed an exercise of market power “will eliminate a possible disincentive

[Footnote continued on following page]

the difference to make such investments, or it might use the funds instead to buy insurance (or some other hedge) against the risk that its unit proves unable to perform during a Performance Assessment Hours. Or, it might simply pay out the difference to its investors, consciously accepting the risk that any Non-Performance Charges it incurs will be manageable, or that, if the penalties become unmanageable, it will simply default and leave behind any performance assurance it may have posted. In any case, the point is this: PJM's notion that all or a sizable share of the spread between Net CONE and actual cost will be invested in availability-improving equipment and improvements is speculative and unproven, at best.

The unfortunate reality is that, if all sell offers at or below Net CONE are effectively insulated from scrutiny under section 6.4(b) of Attachment DD, the door will be thrown open to exercises of market power. It is presumably for that reason that, under ISO-NE's Pay for Performance rules, sellers are required to state the risk premium included in their sell offers separately from their going-forward costs, in order that the IMM can analyze the two separately.¹⁰⁰ Presentation of the data in that form should enable the New England market monitor to more easily identify instances in which a seller's pricing may reflect the exercise of market power. Accordingly, if PJM's revision of the market seller offer cap is accepted, PJM should, at a minimum, also be required to adopt a review mechanism akin to that now used in New England. In no event should PJM be permitted simply to abandon its duty to protect consumers from exercises of seller market power in this setting

to potential sellers of Capacity Performance Resources committing to the capital and operating expenses they need to improve performance, and submitting an offer up to Net CONE that recovers those costs.”).

¹⁰⁰ *ISO New England Inc. and New England Power Pool, supra* note 60 at P 8.

IX. THE NEW ELIGIBILITY REQUIREMENTS PJM WOULD IMPOSE ON EXTERNAL CAPACITY RESOURCES ARE UNJUSTIFIED AND ANTICOMPETITIVE.

As noted, PJM has seized on last winter's events to substantially revise "what it means to be a capacity resource in PJM," and in so doing would force resource owners to expend untold sums of money – sums that ultimately will be charged to load – in order to satisfy PJM of their units' continual availability to generate. But, for reasons not disclosed in the filing, PJM also has decided to use Capacity Performance as a pretext for imposing new requirements on external resources that seek to offer into PJM's capacity auctions. These new and wholly unjustified requirements could sharply reduce the number of external resources seeking to sell capacity into PJM, with the obvious result being a stifling of competition and even more upward pressure on RPM clearing prices.

PJM's first foray into limiting auction participation by external resources came in its filing last year of Capacity Import Limits ("CILs"). PJM proposed, and the Commission approved, specific megawatt caps on the amounts of external capacity that would be permitted to offer into the RPM auctions.¹⁰¹ Those limitations were said to be based on engineering analyses of the import capability available between PJM and adjacent control regions. PJM also offered, however, an option for external resources seeking to bid into the auctions without running the risk of being shut out by the applicable cap. A resource could secure an exception from the applicable CIL if it (i) is pseudo-tied into PJM, (ii) has long-term firm transmission service confirmed on the path from the resource to PJM, and (iii) agrees to be subject to the same

¹⁰¹ *PJM Interconnection, LLC*, 147 FERC ¶ 61,060 (2014).

capacity must-offer requirements as PJM’s internal resources.¹⁰² Although the Commission approved PJM’s Capacity Import Limits proposal over vigorous objections – including objections focused on the adverse competitive impact of the import limits – one commissioner concurred in the order with a plea that PJM and its stakeholders “continue to work towards ensuring that the calculation of the capacity import limit does not unnecessarily limit the most efficient utilization of available resources.”¹⁰³

Rather than heeding that advice, PJM has opted instead through its Capacity Performance filing to further limit the access that external resources will have to PJM’s capacity market. Specifically, PJM proposes that, in order to offer as a Capacity Performance Resource, an external Generation Capacity Resource must qualify for the Capacity Import Limit Exception contained in section 1.7A of the RAA. No longer can an external resource participate in RPM by fitting its transaction within the applicable CIL. Going forward, an external resource can only participate by taking itself *outside the CILs entirely* by satisfying the three requirements for an exception from the caps. The new rule therefore would bar participation in the PJM capacity auctions by a resource that does not satisfy the requirements for an exception but that nevertheless could fit its transaction within the applicable CIL.

In the proceeding in which the Commission considered PJM’s CIL proposal, Exelon and the PJM Utilities Coalition argued that any external resource seeking to offer into a BRA should be required to satisfy all three exception criteria (pseudo-tied to PJM, firm long-term transmission, and acceptance of the must-offer obligation). PJM opposed their position on two grounds: (i) requiring satisfaction of the exception requirements could limit competition from

¹⁰² *Id.* at P 36.

¹⁰³ *Id.* (Norris, Comm’r., concurring).

external resources without providing any offsetting benefits, since the conditions are not needed to assure reliability, and (ii) requiring satisfaction of the three conditions is not comparable to the treatment of internal resources. The Commission agreed with PJM, stating that “we find reasonable PJM’s position that making these three conditions mandatory for all external resources would limit competition from external resources (by making it more difficult for them to qualify as capacity resources) without providing any offsetting benefits.”¹⁰⁴

PJM’s Capacity Performance proposal now adopts the very same requirement that PJM opposed and the Commission rejected in the CIL docket. For whatever reason, PJM now refuses to adhere to the position it advocated just last year – *viz.*, that an amount of resource capacity not in excess of the applicable CIL can be delivered into PJM with sufficient reliability to qualify as a Capacity Resource. PJM’s unexplained shift in position will erect a significant barrier to external resource participation in RPM, thereby reducing competition and driving up clearing prices without providing any offsetting benefits for reliability. PJM’s new restriction also would impair the value of the very substantial investments AMP and others have made to construct external resources that would serve load within PJM. And, finally, by further limiting the ability of resources located outside PJM to participate in providing capacity within PJM, the Capacity Performance proposal takes the region a long step away from achieving the integrated Midwest/Mid-Atlantic wholesale electricity market the Commission has been attempting to promote for the past 15 or more years.

¹⁰⁴ *Id.* at P 49.

X. PJM’S PROPOSAL IS NOT ENTITLED TO DEFERENCE BY THE COMMISSION BECAUSE THE PROCESS PJM USED TO DEVELOP AND APPROVE THE PROPOSAL WAS SERIOUSLY FLAWED.

As Joint Protesters have stated above, a market restructuring as fundamental as Capacity Performance should not be undertaken without a very careful and deliberate stakeholder process that takes into account the full range of stakeholder views and interests, as well as the various initiatives and rule changes PJM already is pursuing in response to last winter’s events. Instead, PJM’s Capacity Performance filing emerged from a needlessly rushed process that substantially reformulated PJM’s existing capacity construct in less than four months. The artificial timeline PJM imposed on the consideration process was met only by greatly curtailing stakeholder participation and limiting stakeholder input in a manner at odds with basic RTO governance requirements. That fact alone constitutes sufficient grounds for the Commission to reject the proposal or, at a minimum, to accord it none of the deference generally extended to an RTO filing that is the product of a full stakeholder process.

Although the Commission has stated that it will accord a measure of deference to filings that grow out of approved stakeholder processes,¹⁰⁵ no deference is due PJM’s Capacity Performance proposal on that basis. PJM’s application in this instance of its Enhanced Liaison Committee (“ELC”) process – the vehicle through which the Capacity Performance was developed – did not satisfy the substantive or procedural requirements for a stakeholder process to which deference will be extended.¹⁰⁶ Such processes must be open and allow extensive participation. The stakeholder process should also “facilitate the board’s direct receipt and

¹⁰⁵ See, e.g., *Southwest Power Pool, Inc.*, 114 FERC ¶ 61,222 at PP 43, 69 (2006); see also *Southwest Power Pool, Inc.*, 127 FERC P 61,283, at P 33 (2009), and *New England Power Pool*, 105 FERC P 61,300, at P 34 (2003).

¹⁰⁶ This is not to suggest that the ELC is inherently impermissible; rather, its application in the instance of the Capacity Performance process was flawed for the reasons discussed in text.

consideration of stakeholder concerns and recommendations, including minority views.”¹⁰⁷

Additionally, the Commission has stated that, while it will accord a measure of deference, it will not accept unjust or unreasonable provisions simply because they result from a stakeholder process.¹⁰⁸

The Capacity Performance proposal does not meet the threshold standard for deference because it is not the product of a sufficiently vetted stakeholder process. PJM spent only four months on a conceptual proposal that evolved dramatically over that short time period. As demonstrated by the deficiencies of PJM’s filing, this time period was inadequate to generate the robust stakeholder process and record typically provided by an RTO, especially for a filing of this importance.

A. PJM’s Original “Liaison Committee” versus the “Enhanced Liaison Committee Process.”

PJM established its original Liaison Committee in its Order No. 719 compliance filing. In its order approving that filing, the Commission approved PJM’s use of a Liaison Committee as part of its stakeholder process because it fulfilled the principles of responsiveness to stakeholders required by 18 C.F.R. § 35.28(g)(6). That regulation states that RTOs must establish business practices that satisfy established criteria for responsiveness to stakeholders. Those criteria are: (1) inclusiveness, (2) fairness in balancing diverse interests, (3) representation of minority positions, and (4) ongoing responsiveness. In acting on PJM’s Order No. 719

¹⁰⁷ *Cal. Indep. Sys. Operator Corp.*, 133 FERC ¶ 61,067 at P 41 (2010); *Midwest Indep. Trans. Sys. Operator, Inc.*, 133 FERC ¶ 61,068 at P 45 (2010); *Southwest Power Pool, Inc.*, 133 FERC ¶ 61,069 at P 34 (2010); *ISO New England Inc.*, et al., 133 FERC ¶ 61,070 at P 65 (2010); *PJM Interconnection, L.L.C.*, 133 FERC ¶ 61,071 at P 36 (2010); *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,072 at P 27 (2010).

¹⁰⁸ *Southwest Power Pool, Inc.*, *supra*, 114 FERC at PP 43, 69; *Southwest Power Pool, Inc.*, 127 FERC ¶61,283 at P 33 (2009).

compliance filing, the Commission noted that PJM's original Liaison Committee "operates as a stakeholder advisory committee to the Board and serves to foster better communications between the Board and PJM's stakeholders."¹⁰⁹ The Liaison Committee provided equal representation from each of the five sectors, ensuring that both majority and minority viewpoints would be taken into account by the PJM Board. The Liaison Committee also jointly established with PJM's Board topics for discussion at general stakeholder meetings. For these reasons, the Commission approved PJM's use of the Liaison Committee as part of its stakeholder process.

The Enhanced Liaison Committee process, however -- a construct developed by PJM and its stakeholders but which has never been approved by the Commission -- bears little resemblance to what the Commission considered in PJM's Order No. 719 compliance filing. The ELC was instituted as a process to handle contentious issues that "would be extremely difficult to resolve within the Stakeholder process."¹¹⁰ The ELC process was approved by PJM members and added to PJM Manual 34 in 2011, but, as part of a business practice manual, it was not placed on file with the Commission pursuant to Section 205. The ELC process imposed minimal transparency requirements on the Board while providing stakeholders limited opportunities to participate and comment on the matter or matters submitted to the process. Although the ELC was approved by PJM members, the Commission has never had occasion to consider whether it satisfies Order No. 2000 or Order No. 719.

According to PJM Manual 34, the ELC process "is intended only for the most difficult issues that affect numerous Members across sectors and involve high stakes regarding policy, finances, and/or industry impacts." The process can be triggered if:

¹⁰⁹ *PJM Interconnection, L.L.C.*, 133 FERC ¶ 61,071, at P 41 (2010).

¹¹⁰ PJM Manual 34: PJM Stakeholder Process, at 72 (2014).

- A sector-weighted vote fails at the Members Committee and PJM concludes that the issue must be addressed by the Board, or
- Members decide through a sector-weighted vote at the Members Committee that an issue should be addressed in such a forum, or
- The Board calls for addressing an issue in such a forum.

PJM Manual 34 goes on to state:

This Enhanced Liaison Committee process is not intended to supplant, replace, or circumvent:

- The recently approved and implemented Consensus-based Issues Resolution (CBIR) process outlined in Stakeholder Manual 34 (though it may accelerate the timeframe and reduce or remove the expectation that Members will seek consensus on the issue.)
- The PJM Board's existing independence, process, or internal deliberations.
- Existing minority rights outlined in Stakeholder Manual 34, including the issuance of ex parte letters by any one party.
- Existing 205 and 206 rights of Members and PJM.
- PJM's ability to comply with FERC, NERC, or any other external filing deadlines.
- The current PJM Compliance Filing protocol.

So, even though the PJM Board is authorized to initiate use of the ELC process, it clearly was not contemplated that the process would be applied in a manner that curtails stakeholder input as much as occurred in this instance.

B. The ELC Process, as Applied, Was Flawed and Inadequate. No Deference is Owed to the Product of that Process.

A review of the short history of the Capacity Performance proposal shows that PJM Staff's Capacity Performance proposal was rushed through the ELC process, and, as a result, it was an incomplete proposal lacking in detail or analysis. From start to finish, the ELC's consideration of Capacity Performance was roughly four months in duration, a portion of which

at the beginning was set aside for “preparation,” and a portion of which at the end consisted of the Board’s closed deliberations after the stakeholder coalition presentations had been made.¹¹¹ This short timeframe did not provide sufficient time for the shifting details of PJM’s proposal to be properly evaluated, nor did it allow for all viewpoints to be formulated and considered. The formal ELC process took place over less than a month, and culminated in a meeting at which a limited number of stakeholder coalitions were allowed to make ten-minute presentations to the PJM Board on the “conceptual proposal” they had been provided for review. Following that meeting, the PJM Board recessed for about one month before announcing that it had decided to authorize PJM Staff to file the Capacity Performance proposal with the Commission. To our knowledge, no meetings with stakeholders took place during that period. Of particular importance – and as PJM admits in its filing -- the proposal that was put before the Board for its approval on December 3 was markedly different in several important respects from the last version of the proposal that PJM Staff had shared with the stakeholders before the November 4 meeting.

The outcome of this process – PJM’s Capacity Performance filing – is owed none of the deference that the Commission generally is willing to accord to filings that are the product of full and open RTO stakeholder processes. As PJM stated in comments to the Commission in the Order No. 2000 rulemaking proceeding:

[W]here ISOs’ decisions are independent and conducted through an extensive stakeholder processes to produce collaborative solutions to market issues, the Commission can

¹¹¹ The PJM Problem Statement, which served as a starting point for discussions, was issued on August 1, 2014. Stakeholder coalition panels made presentations to and engaged in dialogue with the Board on the afternoon of November 4, 2014. The Board authorized PJM Staff to proceed with the Section 205 filing on December 3, 2014. See information posted at <http://www.pjm.com/committees-and-groups/committees/elc.aspx>.

defer confidently to those decisions. Under such circumstances, the Commission can be assured that ISO proposals to changes market rules and procedures would promote competitive markets and are not designed to favor any one group of market participants.¹¹²

The Commission agreed and accepted this comment, stating that “we believe that some degree of deference can be granted on certain issues to independent RTOs that have appropriate procedural mechanisms in place to ensure fair representation of viewpoints.”¹¹³

As it was applied in this instance, however, the ELC did not adhere to these principles. In particular, the process was neither “extensive stakeholder process” nor was it “collaborative.” Rather, as noted, stakeholder participation was confined to pre-submitted written comments and a limited opportunity on a single occasion to make presentations, as part of coalitions, to the PJM Board. The short timeframe within which the Board finalized its proposal was insufficient for it to thoroughly consider all stakeholder comments to the point that those comments would have played a meaningful role in the final determination. Indeed, because (as PJM acknowledges) the PJM Staff proposal underwent “major changes” between the ELC meeting and the Board’s decision to authorize filing,¹¹⁴ stakeholders never had the opportunity to provide input on the proposal the Board actually considered on December 3. A process of that nature simply cannot be reconciled with the requirements of 18 C.F.R. § 35.28(g)(6). Consequently, the Capacity

¹¹² *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at ¶ 31,022 (1999)(Order No. 2000), *order on reh 'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. Iv. FERC*, 272 F.3d 607 (D.C. Cir. 2001)).

¹¹³ *Id.* at ¶ 31,027.

¹¹⁴ See Filing Letter at 21 (referring to “major changes from the prior versions” incorporated in the version of Capacity Performance reviewed by the Board on December 3). The differences between what the Board considered in December and what stakeholders had a chance to address in their comments to the Board in November are spelled out in detail in the Addendum to the December 3, 2014 letter to the Members Committee from Mr. Terry Boston, PJM’s President and CEO, announcing the Board’s decision. Mr. Boston’s letter is posted online at <http://www.pjm.com/~media/committees-groups/committees/elc/capacity/letter-from-terry-boston-pjm-board-of-managers-action-regarding-capacity-performance.ashx>.

Performance proposal filed by PJM in this docket is owed no deference by the Commission as the product of an appropriate RTO stakeholder process.

XI. CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For the reasons we have stated above, Joint Protestors urge the Commission to recognize that there are very serious deficiencies in PJM's Capacity Performance proposal that preclude it from being placed into effect as filed. Simply because PJM pushed Capacity Performance through a hasty process in hopes of rushing it into effect before the 2015 BRA does not mean the Commission should do likewise. Changes of this magnitude require care and deliberation, which Capacity Performance has not received to date. Consistent with that view, we urge the Commission to grant the following relief:¹¹⁵

(A) In order that PJM and its stakeholders may give Capacity Performance the deliberate and reasoned treatment that befits a proposal of this importance, we urge the Commission to reject PJM's December 12, 2015 filing. The proposal should be returned to PJM with explicit instructions by the Commission requiring that PJM proceed as follows:

1. First, PJM should be directed to place its highest priority on addressing the Winter of 2015/16, which has at least the potential to be challenging from a resource adequacy and operations standpoint. PJM should be required to focus on getting in place the resources and the operational process improvements it needs to ensure reliable service during that period before devoting substantial resources to other RPM initiatives.

¹¹⁵ The listed requests are in addition to the recommendations Joint Protestors set forth elsewhere in this Protest in the context of specific issues raised by the filing.

2. Second, after ensuring that the 2015/16 winter period has been satisfactorily addressed, PJM then should convene a stakeholder process to formulate and analyze a comprehensive set of energy market improvements. Those improvements should draw upon, and build upon, the information and insights developed through the Commission's current Price Formation inquiry. At the conclusion of that process, PJM and its stakeholders should be in a position to decide whether revisions in the design of RPM remain necessary, or whether the improved pricing of energy products along, with the various other initiatives now under way in PJM, can be expected to bring about the operational performance improvements that Capacity Performance was designed to achieve.
 3. Third, PJM should be required to file, no later than December 1, 2015, the proposed changes to its energy market rules that emerge from the foregoing stakeholder process. PJM also should be directed to place on file any Tariff, RAA or Operating Agreement revisions it determines are needed to confirm the various operational performance improvement initiatives described herein that are already under way and already producing positive results for the PJM region.
- (B) If the Commission determines not to reject PJM's filing, it should suspend the filed Tariff and RAA changes for five months and set them for hearing. In addition:
1. The Commission should eliminate the 2016/17 and 2017/18 Transition Incremental Auctions. These auctions have not been shown to be necessary for reliability, and would serve only to provide additional revenues to capacity resources that already cleared in the BRAs for those delivery years (and, so, are already committed to serve). Such a result is unjust and unreasonable on its face. If the Commission

declines to eliminate the TIAs for 2016/17 and 2017/18, it then should, at a minimum, delay them in order to provide resource owners a reasonable opportunity to conduct the analyses needed to be able to rationally evaluate their full range of options before being required to make major financial and operational commitments.

2. The Commission should direct PJM to retain the Short Term Resource Procurement Target (“2½% holdback”) as a feature of RPM. PJM has not justified its elimination, and its removal would only cause increased upward pressure on clearing prices with no incremental benefit to loads.
2. In order to ensure that PJM’s already considerable progress toward operational performance improvements continues as the Capacity Performance filing is being adjudicated, the Commission also should direct PJM to implement the more modest changes to its penalty structure and unit commitment rules discussed in Section III.G above.
3. The Commission should direct PJM to evaluate whether the effectiveness of its Capacity Performance-related tariff and RAA changes at the end of the suspension period necessitates, or recommends, changes in the Triennial Review Parameters recently accepted in Docket No. ER14-2940. PJM should be given a specific deadline (for example, June 1, 2015) by which it must file with the Commission appropriate changes to the Triennial Review Parameters, or, alternatively, an explanation of the reasons why PJM believes the effectiveness of its Capacity Performance proposal does not necessitate or recommend changes in the Triennial Review Parameters.

CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused a copy of the foregoing document to be served on each person included on the official service list maintained for this proceeding by the Commission's Secretary, by electronic mail or such other means as a party may have requested, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated this the 20th of January, 2015 at Washington, D.C.

/s/ GARY J. NEWELL

Gary J. Newell